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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 544

JOHN J. CONDON, MAYOR, GUSTAV W. KLEIN, JR., FIRST DEPUTY AND ACTING COMPTROLLER, AND RAYMOND J. WHITNEY, CITY MANAGER, ETC., PETITIONERS,

vs.

WALTER F. DOWNEY, RECEIVER OF THE FIRST NATIONAL BANK AND TRUST COMPANY OF YONKERS, IN LIQUIDATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

Statement Under Rule 13.

This is an appeal by the defendants above named from a judgment made and entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 5th day of August, 1938 in the above entitled case in favor of the plaintiff, Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, against the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, in the sum of $8,295.38, together with interest thereon in the sum of $1,277.98 and costs in the sum of $77.85.

Statement Under Rule 13.

This action was commenced on February 7, 1936 by the original plaintiff herein, Arthur E. Muth, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, by the filing of a praecipe and the issuance of a summons. The summons and complaint with proof of service were filed on February 13, 1936. The defendants filed an answer on March 24, 1936, which was amended by stipulation dated November 24, 1937. Walter F. Downey, having been appointed Receiver of the First National Bank and Trust Company in the place of Arthur E. Muth on November 15, 1937, he was by an order dated November 26, 1937, substituted as plaintiff in the place and stead of said Arthur E. Muth.

On January 4, 1938 this case was tried before Judge John Knight without a jury, a jury having been waived by stipulation on the record. Judge Knight reserved decision.

On June 8, 1938, Judge Knight rendered his decision in favor of the plaintiff.

On July 18, 1938, findings of fact and conclusions of law, as requested by the plaintiff, were signed by Judge Knight and on the same day Judge Knight signed a memorandum containing his rulings upon the defendants' requests for findings of fact and conclusions of law. The findings and memorandum were filed on or about July 29, 1938.

On August 3, 1938, costs were taxed in the sum of $77.85 and on August 5, 1938, judgment was entered by the plaintiff against the defendants in the sum of $8,295.38, together with interest thereon in the sum of $1,277.98.

Thereafter defendants made a motion to determine the applicability of the new Rules of Civil Procedure for guidance on the appeal herein. Judge Knight determined under Rule 86 that the application of the new rules would not be feasible and would work injustice in this case. Accordingly, the former procedure has been followed herein except that

in addition appeal was taken under new procedure out of abundant caution.

On October 31, 1938, an appeal was allowed the defendants from the said judgment of August 5, 1938.

There was no arrest, attachment or reference herein.

Plaintiff has appeared throughout the proceedings in the above entitled action by Benjamin W. Moore, Esq. and the defendants have appeared by Leonard G. McAneny, Esq., Corporation Counsel of the City of Yonkers.

Docket Entries.

Date	Matter
Nov. 7, 1936	Filed praecipe and issued summons.
Feb. 13, 1936	Filed summons and complaint and affidavit of service.
Mar. 24, 1936	Filed stipulation extending time to answer to 3/28/36.
Mar. 24, 1936	Filed answer of defendants.
Nov. 20, 1937	Filed note of issue, motion to substitute party plaintiff, returnable 11/26/37.
Nov. 26, 1937	Filed affidavit and notice of motion to substitute Receiver as plaintiff—no opposition.
Nov. 26, 1937	Motion granted—Mandelbaum, J.
Nov. 26, 1937	Filed order substituting Receiver as party plaintiff—Mandelbaum, J.
Jan. 4, 1938	Before Knight—trial begun, jury waived by stipulation—motion to dismiss, etc. —decision reserved.
June 13, 1938	Filed opinion #11,466. Plaintiff to recover $8,295.38—Knight, J.

Docket Entries.

	Date	Matter
July	29, 1938	Filed findings of fact and conclusions of law—Knight, J.
July	29, 1938	Filed defendants' requests for findings of fact and conclusions of law.
July	29, 1938	Filed opinion #11,597 on defendants' requests for findings of fact and conclusions of law—Knight, J.
Aug.	3, 1938	Filed bill of costs taxed at $77.85.
Aug.	5, 1938	Filed stipulation that defendants' answer be deemed amended, etc.
Aug.	5, 1938	Filed judgment #38,410 for plaintiff for $9,651.21.
Sept.	26, 1938	Filed note of issue, motion to determine civil rules 46 and 37, returnable 10/4/38.
Oct.	22, 1938	Filed affidavit and Notice of Motion to determine civil rules 46 and 73.
Oct.	22, 1938	Filed affidavit in opposition to motion to determine civil rules 46 and 73.
Oct.	22, 1938	Filed order denying motion to determine civil rules 46 and 73—Knight, J.
Oct.	28, 1938	Filed order extending time to file bill of exceptions to 1/7/39—Conger, J.
Oct.	29, 1938	Filed exceptions—Knight, J.
Oct.	31, 1938	Filed petition and order allowing appeal —Bondy, J.
Oct.	31, 1938	Filed Assignment of Errors.
Oct.	31, 1938	Filed cost bond on appeal—Great American Indemnity Co.
Nov.	1, 1938	Filed notice of appeal and mailed copy to Benjamin W. Moore, 11/2/38.
Nov.	3, 1938	Filed citation.
Nov.	22, 1938	Filed Bill of Exceptions and settlement of same (Knight).

Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

L. 63-188.

To the Above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 7th day of February, A. D. 1936.

CHARLES WEISER,
Clerk.

(SEAL)

BENJAMIN W. MOORE,
Plaintiff's Attorney,
Office and Post Office Address:
30 So. Broadway, Yonkers,
State of New York.

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Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff,

against

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JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

Plaintiff complaining of the defendants, by his attorney,
18 Benjamin W. Moore, alleges:

First.—That at all times since the 30th day of September, 1929, the First National Bank and Trust Company of Yonkers has been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

Second.—That the defendants Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey are, respectively, the Mayor, Comptroller and Commissioner of Public Safety of the City of Yonkers, New York, and have since the 1st day

of January, 1932 together constituted the Board of Trustees of the Firemen's Pension Fund of said City of Yonkers having the care, control and management of said fund by virtue of the provisions of Local Law No. 2 of said City of Yonkers duly enacted during the year 1931.

Third.—That on the 20th day of March, 1933 the Comptroller of the Currency of the United States acting under and pursuant to the Bank Conservation Act enacted by the Congress of the United States on March 9, 1933 duly appointed Percival W. Trudeau as Conservator of said First National Bank and Trust Company of Yonkers, and said Conservator, under the direction of said Comptroller, on said March 20, 1933, duly took possession of the books, records and assets of every description of said First National Bank and Trust Company of Yonkers and continued to act as such Conservator until July 24, 1933: that Louis D. Rossire was on said July 24, 1933, by like authority, duly appointed by said Comptroller of the Currency as successor Conservator of said First National Bank and Trust Company of Yonkers in the place and stead of said Percival W. Trudeau; and that said Louis D. Rossire duly qualified as such Conservator and continued to act as such until the 23rd day of January, 1934: that the said Comptroller of the Currency had become satisfied of the insolvency of said First National Bank and Trust Company of Yonkers and that the plaintiff was on that day duly appointed by said Comptroller of the Currency as Receiver of the said First National Bank and Trust Company of Yonkers to liquidate said bank, and that the plaintiff has duly qualified and is now acting as such Receiver.

Fourth.—Upon information and belief that from the said 30th day of September, 1929 the defendants and their predecessors in office have, by virtue of authority vested in them,

maintained a deposit account in said bank under the caption "Firemen's Pension Fund" and on the said 20th day of March, 1933 the credit balance of said deposit account, together with accrued interest computed to the said 20th day of March, 1933, amounted to the sum of Sixteen Thousand Five Hundred Forty and 75/100 ($16,540.75) Dollars.

Fifth: That a pension fund for the firemen of said City of Yonkers was created and established pursuant to the provisions of Chapter 446 of the Laws of the State of New
23 York for the year 1907.

Sixth: That from the time of the creation and establishment of said pension fund to and including the 22nd day of November, 1931 the provisions of the law with regard to the sources of said fund were in substance as follows:

1. All fines imposed on the members of the paid fire department in the city of Yonkers by the commissioner of public safety, when said commissioner of public safety shall be appointed.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given for or on account of
24 extraordinary services of the said paid fire department or any member thereof, except such as have been or shall be allowed by the commissioner of public safety to be retained by the said member or members.

3. All moneys, pay, compensation or salary, or any part thereof, deducted or withheld from any member or members of said paid fire department for or on account of absence or suspension from duty, except in cases of sickness.

4. All moneys which shall be deducted from the monthly pay of each fireman and officer of said department and from the pay of such other employee of said department, as may

be entitled to participate in said fund, and which shall be the sum of two per centum of the monthly pay, salary or compensation each month from each of the said persons.

5. The sum of $5,000 to be levied and raised by the common council each year in the manner prescribed by law.

Seventh: That from the said 23rd day of November, 1931 to and including the 20th day of March, 1933 the provisions of the law with regard to the sources of said fund were in substance, as follows:

1. All fines imposed by the commissioner of public safety on the members of the fire department in the city of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the fire department for account of fire service except such payments or gifts as have been or shall be allowed by the commissioner of public safety to be retained by the members receiving the same.

3. All money, pay, compensation or salary or any part thereof deducted or withheld from any member or members of the fire department, for or on account of absence or suspension from duty except in cases of sickness.

4. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members.

5. An amount payable to the trustees of the firemen's pension fund out of the city treasury at the end of each fiscal year equivalent to one and one-half times the amount of moneys deducted from the monthly pay, salary or com-

pensation of each member of said fire department during said year.

Eighth: That at all the times herein mentioned the purpose and nature of said fund, as provided by law, was to provide for the payment of pensions to duly retired members of the fire department of the City of Yonkers, their widows, children, or next of kin, and in addition thereto, since said 23rd day of November, 1931, to provide for the payment of premiums on group life insurance policies
29 covering the lives of members of said fire department.

Ninth: Upon information and belief that the money maintained as aforesaid on deposit with said bank was not public money of the State of New York or of any of its political subdivisions.

Tenth.—Upon information and belief that from the said 30th day of September, 1929, and on divers dates during the existence of said deposit account, maintained as aforesaid by the defendants and their predecessors, said First National Bank and Trust Company of Yonkers pledged with and to the said City of Yonkers, as security for the
30 repayment of the indebtedness evidenced by said deposit account and as security for the repayment of the indebtednesses evidenced by certain other deposit accounts, certain of the assets of said bank consisting of various and sundry bonds, a schedule of which is attached hereto, marked Exhibit A, and made a part of this complaint, and that the pledge of assets so made to secure the repayment of the indebtedness evidenced by the deposit account maintained as aforesaid by the defendants and their predecessors was unlawful, illegal, null and void.

Eleventh.—Upon information and belief that on divers dates from the said 20th day of March, 1933 to or about the

16th day of December, 1933 the said Conservator and the said successor Conservator recovered from the said City of Yonkers all of the aforesaid assets so pledged with the said City by payments on account of all the aforesaid deposit accounts and on the 26th day of October, 1933 the deposit account maintained as aforesaid by the defendants stood paid out in full. 31

Twelfth.—That under date of December 16, 1933 there was made available to all creditors of the said bank a first dividend of 40% of the amount of their deposits at the time of the bank's suspension. 32

Thirteenth.—That the said payments referred to in paragraph marked "Eleventh" of this complaint on account of the deposit account maintained by the defendants as aforesaid were not ratable with and proportionate to the said dividend made available to the other creditors of the said bank and were illegal, null and void.

Fourteenth.—That there is now justly due and owing from the defendants to the plaintiff the sum of Nine Thousand Nine Hundred Twenty-four and 45/100 ($9,924.45) Dollars representing the difference between the said 40% dividend and the said payments of Sixteen Thousand Five Hundred Forty and 75/100 ($16,540.75) Dollars. 33

Fifteenth.—That no part of said sum has been paid although payment thereof has been duly demanded.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of Nine Thousand Nine Hundred Twenty-four and 45/100 ($9,924.45) Dollars, with interest thereon from the 26th day of October, 1933, besides the costs and disbursements of this action.

BENJAMIN W. MOORE,
Attorney for Plaintiff,
Office & P. O. Address,
30 South Broadway,
Yonkers, New York.

34 *Schedule A, Annexed to Complaint.*

Schedule A.

Description of Assets Pledged	Face Value
Fourth 4¼ Liberty Loan Bonds	$ 40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4¼%	15,000.00
State of Arkansas, 4½s, due 1942	50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
35 Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
36 State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00
Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston, Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
Laclede Gas Light Co. 5½s, due 1935	5,000.00
TOTAL FACE VALUE	$692,000.00

(Duly verified by Arthur E. Muth on February 7, 1936.)

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Answer as Amended by Stipulation, Dated November 24, 1937.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff,

against

38

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

39 The defendants above named by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, for their answer to the plaintiff's complaint, respectfully show and allege:

First.—Deny each and every allegation of said complaint contained in paragraphs marked "Ninth", "Thirteenth", "Fourteenth" and "Fifteenth".

Second.—Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "Twelfth".

40 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Third.—Deny each and every allegation contained in paragraph marked "Fourth" except that on the 20th day of March, 1933, there was a credit balance of a certain deposit account, together with accrued interest in said bank amounting to the sum of $16,540.75.

Fourth.—Deny each and every allegation of said complaint contained in paragraph marked "Tenth" except that the plaintiff, his predecessors, conservators and the First National Bank & Trust Company claimed certain
41 securities with the City of Yonkers for said Firemen's Pension Fund account and other indebtedness of the City of Yonkers.

Fourth-A.—Denies each and every allegation contained in paragraph of the complaint numbered "Eleventh".

Fifth.—That upon information and belief that the Exhibit "A" attached to the complaint is not a correct list of securities pledged with the City of Yonkers on or about the 4th day of March, 1933, in that the following bonds were not in the possession of said City:

42

Fourth 4½ Liberty Loan Bonds....	$40,000.00
Town of Cortland, New York.....	37,000.00
City of New York, Corp. Stock....	10,000.00
Town of Tonawanda, Sewer Bonds'	45,000.00
City of Yonkers, School Bonds.....	10,000.00
United States Fourth Liberty Loan Bonds, 4½%.....	15,000.00

Sixth.—Deny each and every allegation of said complaint marked "Sixth" except admits subdivisions 1, 2 and 3.

Answer as Amended by Stipulation, Dated November 24, 1937.

43

Seventh.—Deny each and every allegation of said complaint marked "Seventh" except admits subdivisions 1, 2 and 3. Subdivisions 4 and 5 are herein set forth in defendants Exhibit "A" hereafter attached.

As a first, separate and complete defense thereto, the defendants further allege:

Eighth.—That the City of Yonkers is a municipal corporation organized under the laws of the State of New York, pursuant to Chapter 452 of the Laws of 1908. 44

Ninth.—That the City of Yonkers is a City of the Second Class, pursuant to Chapter 55 of the Laws of 1909 of New York State.

Tenth.—That Local Law No. 2 (1931) of the Local Laws for cities in New York State superseded and amended previous laws in relation to the Firemen's Pension Fund of the City of Yonkers. A copy of said law is annexed hereto and made a part thereof and marked Exhibit "A".

Eleventh.—That upon information and belief that on or before the 4th day of March 1933, the First National Bank & Trust Company in Yonkers had the authority to pledge its assets to secure public money in the State of New York. 45

Twelfth.—That prior to the 20th day of March 1933, the City of Yonkers maintained a general deposit account and numerous other accounts including the Firemen's Pension Fund account in the First National Bank & Trust Company of Yonkers.

Thirteenth.—That prior to the 20th day of March, 1933, the said First National Bank & Trust Company of Yonkers

46 *Answer as Amended by Stipulation, Dated November 24, 1937.*

pledged certain securities with the City of Yonkers as security for the repayment of its deposits with said bank as more clearly shown by plaintiff's Exhibit "A", except as hereinbefore denied.

Fourteenth.—That pursuant to Section 69 of the Second Class Cities Law, Chapter 55 of the Laws of 1909, and amendments thereto, the Board of Estimate and Apportionment had the authority to designate depositories for the City of Yonkers, a copy of which section is attached hereto
47 and made a part hereof, and marked Exhibit "B".

Fifteenth.—That on or about the 10th day of July, 1929, said Board of Estimate and Apportionment of the City of Yonkers designated the First National Bank of Yonkers and the Yonkers Trust Company and others as depositories and fixed the rate of interest to be received, including the Firemen's Pension Fund, by the City Treasurer of Yonkers. A certified copy of said resolution is hereto attached and made a part hereof and marked Exhibit "C".

Sixteenth.—That upon information and belief that on or
48 about the 30th day of September 1929, the Yonkers Trust Company and the First National Bank of Yonkers merged and said merger is filed in the office of the Register of Westchester County in Liber 10 of Miscellaneous Records.

Seventeenth.—That the Firemen's Pension Fund of the City of Yonkers was a public fund of said City.

As a second, separate and complete defense hereto, the defendants further allege:

Eighteenth.—The allegations contained in said answer numbered "Eighth" to "Seventeenth" inclusive, are hereby realleged, with the same force and effect as if stated.

Answer as Amended by Stipulation, Dated November 24, 1937.

49

Nineteenth.—That the defendants at no time as alleged in the said complaint maintained an account known as the Firemen's Pension Fund in the plaintiff bank.

Twentieth.—That the City Treasurer of the City of Yonkers maintained an account in the said bank designated as the Firemen's Pension Fund of the City of Yonkers, prior to the 20th day of March, 1933.

Twenty-first—That the said First National Bank and Trust Company accepted said deposit designated as the 50
Firemen's Pension Fund of the City of Yonkers as public money of the City of Yonkers and pledged its security for the repayment of the same.

As a third, separate and complete defense thereto, the defendants further allege:

Twenty-second.—The allegations contained in said answer numbered "Eighth" to "Twenty-first" inclusive, are herein re-alleged with the same force and effect as if stated.

Twenty-third.—That upon information and belief that 51
on the 20th day of March, 1933, the City of Yonkers held securities for its deposits including the Firemen's Pension Fund of the City of Yonkers, negotiable bonds in the sum of $535,000.00 of the First National Bank & Trust Company of Yonkers.

Twenty-fourth.—That upon information and belief that there was on deposit with the said bank on the 20th day of March, 1933, moneys belonging to the City of Yonkers in deposits, including the Firemen's Pension Fund, the sum of $328,026.04.

52 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Twenty-fifth.—That upon information and belief that prior to the second day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank & Trust Company of Yonkers, voluntarily released all moneys of the said City of Yonkers, including the Firemen's Pension Fund.

Twenty-sixth.—That upon information and belief the said release of City deposits, including the Firemen's Pension Fund, was made pursuant to instructions of the Comptroller of Currency of the United States, or his deputies.

53

Twenty-seventh.—That upon information and belief that the said City deposits, including the Firemen's Pension Fund, were released only after the opinion was given to the Conservator, Percival W. Trudeau by his attorney.

Twenty-eighth.—That the said City of Yonkers relying upon the voluntary return of all moneys of the said City of Yonkers surrendered to the Conservator of the First National Bank & Trust Company the aforesaid securities in the sum of $535,000.00.

54

Twenty-ninth.—That said payment by the Conservator and his successor was voluntary and without duress or fraud and cannot be recovered back.

As a fourth separate and complete defense thereto, defendant further alleges:

Thirtieth.—That the aforesaid payments to the Firemen's Pension Fund were voluntary payments and at the time of said payments the First National Bank & Trust Company of Yonkers was not insolvent.

WHEREFORE, defendants demand judgment dismissing the complaint, together with costs and disbursements of this action.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants,
City of Yonkers, Yonkers, N. Y.

(Duly verified by Joseph F. Loehr, James E. Hushion and Dennis M. Morrissey on February 28, 1936.)

56

Exhibit A.

Local Law No. 2-1931 of The City of Yonkers.

(Printed as part of Defendant's Requests for Findings of Fact and Conclusions of Law at page 108 to page 116.)

Exhibit B.

57

Section 69 of the Second Class Cities Law.

(Omitted for brevity; may be found in Public Laws.)

Exhibit C.

Certified Copy of Resolution of Board of Estimate

(Printed as Defendant's Exhibit C-1, page 100.)

58

Stipulation Amending Complaint and Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

59 Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

60

L. 63-188.

The attorney for the plaintiff hereby consents that the defendants' answer be deemed amended so as to include therein a paragraph as follows:

"Fourth-A: Denies each and every allegation contained in the paragraph of the complaint numbered "Eleventh".

The attorney for the defendants stipulates and agrees that in consideration of the above consent by the attorney

for the plaintiff that the plaintiff may, upon the trial of this action, present proof that the payments referred to in paragraph numbered "Eleventh" of the complaint occurred from and after the 3rd day of March, 1933 and the said complaint and answer are hereby deemed to have been amended accordingly.

Dated, November 24, 1937.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Attorney for Defendants.

64 **Bill of Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

65 JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

L. 63-188.

BE IT REMEMBERED that at a stated Term of the District
66 Court of the United States for the Southern District of New York on January 4, 1938, before the Honorable John Knight, United States District Judge for the Western District of New York, then sitting in and for the Southern District of New York, presiding, the following proceedings were had:

Appearances:

BENJAMIN W. MOORE, Esq., and MILTON L. ROMM, Esq., Attorneys and Counsel for Plaintiff.

LEONARD G. MCANENY, Esq., Corporation Counsel of the City of Yonkers; MORRIS ROSENWASSER, Esq., First Assistant Corporation Counsel; and HAROLD T. GARRITY, Esq., Assistant Corporation Counsel, Attorneys and Counsel for Defendants.

The Court: Do I understand correctly that in each of the cases the jury issue is to be waived? 67

Mr. Moore: That is correct. Is that right, Mr. McAneny?

Mr. McAneny: Yes.

Mr. Moore: The jury is waived.

The Court: The stenographer will note the stipulation then. That is true as to each one of the cases. The case with the lowest number is to be tried first.

Mr. Moore: That is Case L. 63-188.

Mr. McAneny: The Firemen's Pension Fund. Before we proceed, there is an order entered in this case amending the answer. I think it affects certain of the issues, and I think counsel for the plaintiff will agree that it may be submitted and marked in evidence. 68

Mr. Moore: Yes. I will agree as to that. There is a stipulation also entered into to be offered in evidence.

Mr. McAneny: Yes.

The Court: The amended answer is on file, is it not?

Mr. McAneny: I would like to have it on the record.

Mr. Moore: I will consent that any amendment to the answer, in compliance with the stipulation, may be filed.

The Court: The amended answer has not been filed. The stipulation covers this. I wish you would state just what is the issue involved, ~~in~~ an opening. 69

Mr. Moore: This action is brought by the Receiver of the First National Bank and Trust Company of Yonkers to recover alleged preferences which were paid out during the closing of the bank to the Firemen's Pension Fund of the City of Yonkers. The bank had put up as security for deposits with the City of Yonkers some 560-odd thousand dollars worth of bonds. I am not sure of the exact amount. After the bank closed and from the date of the closing right down through to the two conservatorships the City had withdrawn all its funds in all four accounts and had re-

turned to the bank the security or the bonds which the bank had put up as collateral security. Of course those bonds were bonds that were purchased by the bank with the depositors' money, and we claim that the act in putting up the bonds was *ultra vires*, and the City in receiving 100 per cent received an illegal preference over the other depositors in the bank. We are now seeking to recover the overdraft that they made, which we call an illegal preference. I think this will be unfolded as we proceed with the trial.

The Court: It involves one of the special funds, the so-called Firemen's Fund?

71 Mr. Moore: This involves the Firemen's Pension Fund of the City of Yonkers.

The Court: What is the amount that is involved?

Mr. Moore: $16,590.75.

The Court: It says $9,924.45.

Mr. Moore: That was the orginal amount, and one-half of that, with interest added to it, brings it up to that amount.

The Court: $16,000.

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72 Walter F. Downey, the plaintiff herein, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Mr. Moore: I first offer in evidence a certified copy of Mr. Downey's commission as Receiver of the First National Bank and Trust Company. Is there any objection to that?

Mr. Garrity: No objection.

(Marked Plaintiff's Exhibit No. 1.)

Q. Have you qualified as Receiver of the First National Bank and Trust Company of Yonkers and are you now acting as such Receiver? A. Yes.

Q. Are you in charge of the liquidation of that bank? A. Yes.

Q. What is the official date of the bank's closing?

Mr. McAneny: I object to that as calling for a conclusion and not a statement of fact. There is no official date of the bank's closing. It is a matter of proof that the bank ever did close within the contemplation of the law. 74

Mr. Moore: I withdraw that question.

Q. Do you know from an examination of the books and records of the bank the date of the bank's closing?

Mr. McAneny: I object to that on the same ground. The witness is not qualified to answer that question. It is a question of fact to be proved in this case.

Mr. Moore: I have the proclamation of the Governor and the Comptroller that I am going to introduce in evidence as I go along with this witness.

Mr. McAneny: The books and records and documents may be introduced in the case if they are relevant, and from those the question of law can be deduced, but this witness is being asked a question of law. I therefore object on the ground that it is such a question that he is not qualified to answer. I think it is not the best proof to be offered as to any closing. 75

The Court: Is the question of the date material?

Mr. Moore: I withdraw that question, your Honor. I will take it up with another witness.

76 *Walter F. Downey, Plaintiff—Direct.*

Q. As to what date was the claim of general depositors calculated and allowed? A. As of the close of business of March 3rd.

Mr. McAneny: I object to that statement "as of the close of business." This witness is not qualified to answer these questions. He has been around for several months, from November 15, 1937. All these are matters of record and not dependent on the answers of this witness. We are entitled to question all of those facts, if they are submitted as facts.

77 The Court: I think you can first show the date of the closing of the bank in the regular order.

Mr. Moore: He is the man that is liquidating the bank. He has a right to tell as to what time the claims of the general depositors were calculated and allowed. That is the best evidence.

Mr. McAneny: He can state it but he cannot characterize the evidence.

Q. What was the date? A. The close of business of March 3, 1933.

Mr. McAneny: I object to the "close of business."

78

Q. It was on March 3, 1933; is that correct? A. It was the close of business of March 3, 1933.

Mr. McAneny: I object to that statement as characterizing the evidence.

The Court: He is asking him now merely as to the time.

Mr. Moore: The time the claims of general depositors was calculated and allowed.

The Court: March 3, 1932?

The Witness: 1933.

Q. As of what time were the set-offs calculated and allowed? A. March 3, 1933.

Q. As of what time is the interest on interest-bearing deposits allowed? A. March 3, 1933.

Q. There was a first dividend of 40 per cent made available to the general depositors? A. Yes.

Q. On what date? A. December 16, 1933.

Q. Was a second dividend of 10 per cent made available to the general depositors? A. Yes.

Q. On what date? A. November 3, 1937.

Mr. Moore: I want to now offer in evidence and 80
read in evidence Section 2, Article XII, of the City of Yonkers, Laws of 1908, Chapter 452.

Before I offer those in evidence, you may cross-examine, Mr. McAneny.

Mr. McAneny: Are you through?

Mr. Moore: Yes. I am going to offer some things in evidence.

Cross examination by Mr. McAneny:

Q. The statement you have made with reference to certain dates are not within your own knowledge, are they, Mr. Downey? A. They are from instructions from the 81
Comptroller of the Currency in a letter stating those dates, Mr. McAneny.

Q. That is the source of your information? A. Yes, sir.

Q. When did you first come to Yonkers? A. Well, I came to Yonkers for one day prior to November 15, 1937.

Q. But you were not officially connected with this bank prior to that date, were you? A. No, I was not.

Q. You have had no official acts with respect to this bank prior to November, 1937? A. No. Only, Mr. McAneny, in connection with my position in Washington as Personnel Officer of the Division of Insolvent National Banks. Those

82 *Walter F. Downey, Plaintiff—Cross.*

were matters relating to personnel matters in connection with the affairs of the trust company.

Mr. McAneny: That is all.

Mr. Moore: That is all. I want to read in evidence——

The Court: That commission is dated November 15, 1937?

Mr. Moore: November 15, 1937.

I want to read into the record Section 2 of Article XII, of the Supplemental Charter of the City of
83 Yonkers, Laws of 1908, Chapter 452 (reading):

(Omitted for brevity; may be found in Public Laws of New York.)

The Court: What year is that act?

Mr. Moore: 1908.

Mr. McAneny: I move to strike that out. The whole act has been superseded by the Local Law of the City of Yonkers.

The Court: I will let it stand for the present.

Mr. Moore: I offer in evidence and want to read into evidence Local Law No. 2 of 1931 of the City
84 of Yonkers.

Mr. McAneny: If the Court please, Subdivision 5, as read, is not as it appears in the original charter.

Mr. Moore: It appears in the official book. I have read it from the book.

Mr. McAneny: What book are you reading from?

Mr. Moore: From the Laws of New York, Official Series 131, Session of 1908, Volume 2.

Mr. McAneny: That has been amended all the way up.

Mr. Moore: You can point that out. Section 1 and 2 of Local Law No. 2 of the City of Yonkers——

The Court: Are those numbered Local Laws 1 and 2?

Mr. Moore: Sections 1 and 2 of Local Law No. 2, 1931, City of Yonkers.

The Court: All right.

Mr. Moore: (Reading):

(Printed as part of Defendants' Requests for findings of fact and Conclusions of Law, page 108 to page 111.)

I would like to read into the record this Article 86
III-A.

Mr. McAneny: If the law is being offered, it should be offered as a whole. If it is read into the record, it seems to me the whole of it should be read into the record.

Mr. Moore: There are only certain parts that are necessary.

The Court: I will let him read those parts that he desires. You may offer the rest of it later on.

Mr. Moore: You can offer the rest of it, if you want to.

Mr. McAneny: As I understand it, it being the local law of the City and it having been so conceded 87
by the counsel for plaintiff, the Court can take judicial notice of the entire law.

The Court: What is the purpose?

Mr. Moore: I want to read Article III-A of the Laws of New York, 1933 (reading):

(Omitted for brevity; may be found in Laws of New York, Chap. 667, Art. III A, 1933.)

I would like to call Mr. Power to the stand.

88 *John B. Power, for Plaintiff—Direct.*

JOHN B. POWER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore.

The Court: Before we proceed, let me ask one question: A question is raised here in reference to the proof of the appointment of the Receiver. I do not see that the third paragraph of the complaint is denied.

Mr. Moore: It is not denied.

89 The Court: It is not denied, as I take it.

Mr. Garrity: It was not a question of his appointment. It was a fixed date. I think he was appointed November 15, 1937.

The Court: I see in the third paragraph that it is alleged that on the 20th day of March, 1933, the Comptroller of the Currency of the United States acting under and pursuant to the Bank Conservation Act enacted by the Congress of the United States on March 9, 1933, duly appointed Percival W. Trudeau as Conservator of the said First National Bank and Trust Company of Yonkers. That is in March, 1933.

90 Would not that fix the date of the closing of the bank?

Mr. Romm: That is not denied. That is why we did not bother proving it.

The Court: Some question was raised here as to the proof with reference to the date of closing of the bank.

Mr. Moore: I think I will clear it up with this witness and some other records.

The Court: I do not know that it is essential to prove that in view of the pleadings.

Q. Mr. Power, what is your present employment? A. I am a clerk in the employ of the Receiver of the First National Bank and Trust Company of Yonkers, in liquidation.

Q. Were you employed by the First National Bank and Trust Company of Yonkers? A. I was.

Q. For how long? A. Since October 1, 1929.

Q. What position did you hold there? A. Assistant cashier.

Q. Did you continue in the employment of the Conservator and of the Receiver? A. I did. 92

Q. Do you recall March 4, 1933? A. I do.

Q. On what day of the week was that? A. On Saturday.

Q. Was the bank open for any kind of business on that day? A. No.

Mr. Moore: I want to offer in evidence a certified copy of the order of the Governor of the State of New York relating to the bank holiday, a proclamation, rather.

Mr. Romm: No objection to the proclamation of March 4th.

(Marked Plaintiff's Exhibit No. 2.) 93

Mr. Moore: Proclamation of the Governor of March 6th is offered and there is no objection to it.

(Marked Plaintiff's Exhibit No. 3.)

Q. Until what date did the bank continue closed for all business? A. Until March 10, 1933.

Q. Was any business at all transacted between March 4th and March 9th, inclusive? A. No.

Q. What type of business was transacted in the bank on March 10, 1933? A. Restricted business.

94 *John B. Power, for Plaintiff—Direct.*

Mr. McAneny: I object to that as not responsive.

The Court: Sustained.

Mr. Moore: Sustained; exception.

A. Notes could be——

Mr. Moore: He sustained the objection.

The Court: I will strike out the answer. Your inquiry was what business was done after March 9th or March 10th?

Mr. Moore: Yes.

95 Q. Did the bank ever reopen for regular business? A. No.

Mr. McAneny: I object to that as calling for a conclusion also.

Q. You were there all the time, were you not? A. I was.

Mr. McAneny: He can state what happened in the bank and what was done, but to characterize it is not within his province.

Mr. Moore: He knows of his own knowledge.

The Court: What is the significance of this evi-
96 dence as to those dates? As to the nature of the transactions of the bank or the time of its closing, do those concern the issues here?

Mr. McAneny: I think there is a very important issue as to the question of solvency. I think that is a question that is to be proved in this case.

The Court: I do not know whether the question of what was done or as to the closing of the bank and what business they did during that period, I do not know whether that would be material.

Mr. McAneny: I do not think it is material.

The Court: I think we ought to get along with the testimony as best we can.

Mr. Moore: I want to mark the Firemen's Pension Fund ledger, this book, for identification.

(Marked Plaintiff's Exhibit 4 for identification.)

Q. I show you this book and ask you if that is the Firemen's Pension Fund ledger?

Mr. McAneny: Is that the book of the bank?

Mr. Moore: Yes. I am just having it marked for identification. You can see it in just a moment.

A. I can, Judge. 98

Q. I ask you if that is the Firemen's Pension Fund ledger in the bank? A. It is, yes.

Q. Was Plaintiff's Exhibit No. 4 marked for identification a record made in the regular course of the bank's business?

Mr. McAneny: I object to that question. Did he make the record? Did you keep the book?

The Witness: Shall I answer?

Mr. Moore: Yes.

The Witness: No, I did not keep the book.

99

Q. But you are familiar with the books? A. I am.

Q. Was that book which is marked for identification made in the regular course of the bank's business? A. It was.

Mr. McAneny: I object to that, if your Honor please. The witness is not competent to answer.

The Court: Let's see the source of his knowledge. What is your position with the bank? I do not recall it.

The Witness: I was assistant cashier.

The Court: What did your duties as such include?

100 *John B. Power, for Plaintiff—Direct.*

The Witness: Most everything in general. I had access to most everything.

The Court: I will let him state.

(Record read by the stenographer.)

Q. Was it in the regular course of the bank's business to have these records made on the day when the transactions described in them occurred?

Mr. McAneny: I object to this line of questioning unless the person is produced who kept this book?

101 The Court: I think it is a little different inquiry. He is not inquiring as to the specific things done, but as to the course of business of the bank, whether it was making the entries on certain dates or otherwise.

Mr. McAneny: I do not see, if your Honor please, just how that affects what the entries in this book may be or may not be, because here is a book produced and evidently they are relying on it. I would like to cross examine as to the entries and cross examine the proper person. I think it is irrelevant. I object to it on that ground.

102 The Court: I think it is competent as showing the general practice.

Mr. Moore: The general practice of the bank and what they did with these records. This man who was one of the officers in the bank knew the customs and practices of the bank. That is the way we always prove those matters.

The Court: I will receive it, with an exception to the defendants. You may inquire as to it.

Mr. Moore: I offer Plaintiff's Exhibit 4 marked for identification in evidence.

Mr. McAneny: I object to that on the ground that it is not proved and no foundation has been laid for the receiving of this book up to the present time.

The Court: Overruled.

Mr. McAneny: Exception.

(Plaintiff's Exhibit No. 4 for identification received in evidence.)

Mr. Moore: You may ask, Mr. McAneny.

Mr. Garrity: May I have that book?

Mr. Moore: Yes, certainly (handing).

Cross examination by Mr. McAneny:

Q. Will you take this book, Mr. Power? Did you make 104
the entries in that book (handing to witness)? A. No.

Q. Do you know who did? A. No.

Q. You mean to say you have been so closely associated with the bank and yet you do not know the individual that kept that book? A. That is correct.

Q. It might have been made by a number of people? A. The party who was in charge of the bookkeeping department.

Q. Who was that? A. Mr. Spyce.

Q. What is his first name? A. Louis.

Q. Is he living now? A. Yes.

Q. He is not in court, is he? A. No. 105

Q. The books purport to contain certain entries under the heading "Yonkers Firemen's Pension Fund"? A. "Firemen's Pension Fund, City of Yonkers."

Q. So far as that book shows, what are the dates covering those entries? A. From March 1, 1933 to October 26, 1933.

Q. Does that book purport to show the receipts and disbursements? A. It does.

Q. Does it include debit items in the accounts of depositors? A. That is right.

Q. What is the source of those items? How are they put into that book? A. I do not quite get your question.

Q. You say that book is kept by an individual? A. That is right.

Q. Where does he get the items that he puts into that book? A. From his checks or deposits.

Q. You mean the checks drawn against that account? A. That is right.

Q. Those checks are the original items and they are the original entries in that account, are they not? A. Yes.

Q. Have you in your possession any checks that were paid out of that account? A. No.

107 Q. Are any of the moneys in that account paid directly to the depositors? A. I could not say. I have not the checks.

Q. The checks would indicate that? A. Yes.

Q. You do not know of your own knowledge? A. No.

Q. All you know is that it is a book of the bank? A. Yes.

Q. You have absolutely no personal knowledge whatever? A. As to what?

Q. As to the nature of the entries and what the original source of information was from which those entries were made? A. The nature of the entries were checks.

Q. How do you know that? A. That is in the general course of business of the bank.

108 Q. You did not see the checks entered there, did you? A. Not personally, no.

Q. You have not produced any of those checks here, have you? A. No.

Q. What is that account captioned in that book? A. "Firemen's Pension Fund, City of Yonkers."

Q. I hand you certain drafts or checks and ask you to examine them and tell me whether those checks were paid by the bank out of the fund that you have been referring to (handing to witness)? A. Do you want me to examine each check?

Mr. Moore: Do you want him to examine each check, he says?

Mr. McAneny: Yes.

The Court: Can we stipulate as to that? Is there any question about it?

Mr. Romm: We have never seen them.

Mr. Moore: He wants them returned a moment.

Q. Yes. I would like to have you examine them and go over them and tell me if those checks were drawn on that account?

Mr. Romm: Take your time and examine each one. (Handing to witnesss.)

Mr. Moore: Have you completed your examination?

The Witness: I have to question one check, Judge.

Q. Are all of the others all right? A. Yes. I am not sure how these are handled.

Q. Describe that check. A. It says "Paid by Check 47." It was probably a Conservator's check given in lieu of it. As to all the other checks——

Q. They all went through the bank? A. Yes.

Q. In the form as indicated? A. Yes.

Q. These checks on the reverse side indicate the date upon which they were paid by the bank? A. The cancellation would show that.

Q. Shown on each check? A. I suppose so. I did not look them over to see if that is right. All checks are cancelled with the exception of two.

Q. Which two are they? A. One check payable to Mary Powers, dated April 29, 1933.

Q. That was never cancelled? A. That was never cancelled by the bank.

112 *John B. Power, for Plaintiff—Cross.*

Q. Did it go through the bank? A. It is evident that a check was given in place of this, a Conservator's check.

The Court: That is the one you referred to?

The Witness: Yes. A $50 check.

Q. How did you say that check was made out? A. Mary Powers.

Q. Mary Powers? A. That is right.

Q. That is not indicated on the book as having gone through the bank? A. I have no way of checking that.

113 Q. But all the others there indicate by dates the cancellation? A. With the exception of another $50 check.

Q. Which one is that? A. Payable to Mary Powers.

Q. Two checks payable to Mary Powers? A. That is correct.

Q. Those evidently, as far as you can see, did not go through the bank? A. On one check I can identify a stamp of one of our tellers at the time. Each teller used a stamp whenever cashing a check, and I can identify that stamp, the rubber stamp, with a "K," a fellow by the name of Ketcham.

Q. You identify that stamp on those two checks of Mary

114 Powers? A. On one I do.

Q. So one of them went through the bank? A. This check, it went through the bank.

Q. The other you could not be sure about? A. I could not be sure about it.

Q. Is that the only check that you are not sure that went through the bank? A. That did not show a cancellation.

Q. And the bank paid out money to the holders of those checks, as indicated; is that correct? A. No, I could not swear to that.

Q. Can you look at a check and indicate to me that it was paid? A. Yes.

Q. All right. Look through them and tell me. Identify any of those checks which you say were not paid in due course by the bank, according to the tenor of the check. A. Mary Powers, two of them.

Q. That is all? A. That is all.

Q. The others were paid? A. The others were paid.

By Mr. Moore:

Q. Do you know to who they were paid? A. They all state on here to whom they were paid.

Q. I thought you said you had no way of telling whether 116
the payee received the money or not. A. On those checks, Judge.

By Mr. McAneny:

Q. In connection with the deposit items in that account, who made those deposits? They were made by the City of Yonkers? A. They were made by the City of Yonkers to the Firemen's Pension Fund, as far as I can see.

Q. Each one of those checks that went through the bank bears on it "City of Yonkers, Firemen's Pension Fund"? A. That is correct.

Mr. McAneny: I would like to have those checks, 117
I think they number about 100, marked as one exhibit for identificatfon.

The Court: Yes.

(Marked Defendants' Exhibit A for identification.)

Mr. McAneny: Consisting of approximately 100 checks.

Mr. Romm: Have you counted them?

The Witness: No.

Mr. McAneny: (To the Clerk.) Perhaps you better count them.

118 *Carl H. Vanvick, for Plaintiff—Direct.*

The Clerk of the Court: 117.

Mr. Moore: 117, he says, approximately.

The Court: Those are considered as Defendants' Exhibit A for identification.

Mr. McAneny: There being no objection to putting those in evidence at this time, I offer them in evidence, since we are trying this without a jury.

Mr. Moore: No objection at all.

(Defendants' Exhibit A for identification received in evidence.)

119 Mr. McAneny: That is all.

(Witness excused.)

CARL H. VANVICK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. Mr. Vanvick, are you employed by Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers? A. I am.

120 Q. In what capacity are you employed? A. Auditor in charge of the books and records and matters pertaining to the claims.

Q. Were you employed by the Receiver prior to Mr. Downey's becoming appointed Receiver? A. Yes.

Q. How long have you held the position of auditor with the receivership? A. Since April 16, 1934.

Q. Will you tell us what experience you have had, Mr. Vanvick, as auditor, banking exeperience? A. I worked in the First National Bank, Sioux City, Iowa, from 1923 to 1930 in various capacities, the last position being auditor and transit manager. The bank closed in 1930. I immediately went to work for the receiver of the bank and was in

his employ until June, 1932, when the receiver and I were transferred to New Haven to take over the National Tradesmen Bank and Trust Company of New Haven. I kept up all records, the receivership books, and was in his employ until August, 1933, and that bank was reorganized. From there I went to the office of the Comptroller of the Currency in Washington and was there for two months, when they sent me out on the road setting up receivership books of various receiverships. I spent four months in Grand Rapids, Michigan, setting up the books and records of the Grand Rapids National Bank, Grand Rapids, Michigan. From there they transferred me to Vermont, where I set up four different receivership books.

April 16, 1934 was my last experience in setting up records. That was with the First National Bank and Trust Company.

Q. That was when you came with the First National Bank and Trust Company? A. Yes.

Q. Are you familiar with the ledger and records of that bank? A. Yes.

Q. Are you familiar as to what time the claims of general depositors was calculated and allowed? A. Yes.

Q. From what date? A. The close of business, March 3, 1933.

Mr. McAneny: I object to the chacterization of "close of business."

The Court: I will allow it.

Mr. McAneny: Exception.

Mr. Moore: I think this establishes the closing of the bank, the date.

Mr. McAneny: This man can only testify as to what the book shows, and he cannot characterize it.

The Court: The date appears. He can calculate it from a certain date.

124 *Carl H. Vanvick, for Plaintiff—Direct.*

Q. What date did you say? A. March 3, 1933.

Q. Can you tell us as of what time the set-offs were calculated and allowed? A. March 3, 1933.

Q. As of what time is interest on the interest-bearing deposits allowed? A. From what time or to what time?

Q. From what time? A. Interest ceased at the close of business, March 3, 1933.

Mr. McAneny: I object to the "close of business."

The Court: Strike out the words "close of business." It ceased March 3, 1933?

125 The Witness: That is right.

Q. Do the bank records show a deposit account maintained under the name of the Firemen's Pension Fund? A. Yes.

Mr. McAneny: I object to that on the ground that the account has already been identified as the City of Yonkers, Firemen's Pension Fund.

The Court: Overruled.

Mr. McAneny: Exception.

Q. Was that account an interest-bearing checking account?

126 The Court: The Firemen's Fund deposits?

Mr. Moore: Yes; the Firemen's Pension Fund.

A. Referring to the record of the account, there appears no deposit, so I cannot determine from this ledger:

Q. Whether it was interest-bearing? A. Whether it was interest bearing or not.

Q. What was the balance, together with the accrued interest, at the close of business—what was the balance at the close of the day on March 3, 1933? A. The record shows $16,590.75.

The Court: How much is that?

The Witness: $16,590.75.

Q. When did the first withdrawal from the account occur after March 3, 1933? A. March 18, 1933.

Q. How much was withdrawn from the account on that date? A. $100.

Q. What is the interest due on that withdrawal from that date down to the present time? A. $18.97.

Q. On what basis did you calculate that interest? A. The legal rate of 6 per cent from March 3, 1933, to December 16, 1933 on $100. 128

Q. Is that March 18, 1933? A. From March 18, 1933 to December 16, 1933, on 60 per cent of the withdrawals, or $60. From December 16, 1933, to November 3, 1937, then on 50 per cent, or $50; from November 3, 1937 to January 3, 1938.

Q. Have you used the same basis in all of your calculations? A. I have.

Q. When did the next withdrawal from the account occur? A. March 20, 1933.

Q. How much was withdrawn from the account on that date? A. $50.

Q. What is the interest on that withdrawal? A. $9.47. 129

Q. That was arrived at in the same way that the other interest amount was arrived at? A. Yes.

Q. When did the next withdrawal from the account occur? A. March 28, 1933.

Q. How much was withdrawn on that date? A. $37.50.

Q. Have you there before you a complete account of the withdrawals and date of withdrawals and the interest figured on the withdrawals right down to date? A. I have.

Mr. Moore: Have you any objection to him reading them in evidence?

130 *Carl H. Vanvick, for Plaintiff—Direct.*

Mr. McAneny: Except subject to my motion to strike out as being irrelevant.

The Court: If it does not correspond with the book?

Mr. McAneny: And subject to any motion I want to make.

The Court: Yes.

Q. Will you just give us the amount that was withdrawn and on what date and the interest shown on the paper that you have prepared so we can have a record of it?

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The Court: And the total.

Q. (Continuing) The total of the interest that we claim is due.

The Court: Also the total withdrawals.

Mr. Moore: Yes, the total withdrawals and the dates.

The Court: The dates.

Q. (Continuing) I want the dates, the amounts of withdrawals, and the interest as you figured it in the first two withdrawals you have told us about. A. Aggregate amount of interest due?

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Q. Yes, down to the present time. A. March 31, 1933, withdrawal of $220.83; interest due, $41.40.

April 1, 1933, withdrawal of $2,358.89; interest due, $441.93.

April 3, 1933, withdrawal of $1,925; interest due, $360.01.

Mr. McAneny: He says "interest due." You mean in accordance with your calculation?

The Witness: Yes.

The Court: Interest computed.

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Mr. McAneny: That would be better, interest computed.

A. (Continuing) April 4, 1933, withdrawals of 304.17; interest computed, $56.84.

April 5, 1933, withdrawals of $343.75; interest computed to be $64.17.

April 6, 1933, withdrawals of $150; interest computed to be $67.98.

April 7, 1933, withdrawals of $197.91; interest computed to be $36.88.

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April 10, 1933, withdrawals of $102.08; interest computed to be $18.99.

April 13, 1933, withdrawals of $95.83; interest computed to be $17.76.

April 29, 1933, withdrawals of $104.17; interest computed to be $19.05.

May 1, 1933, withdrawals of $2,341.68; interest computed to be $427.16.

May 2, 1933, withdrawals of $1,002.09; interest computed to be $182.64.

May 3, 1933, withdrawals of $6,219.36; interest computed to be $1,132.47.

May 4, 1933, withdrawals of $691.66; interest computed to be $125.84.

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May 6, 1933, withdrawals of $195.83; interest computed to be $35.56.

May 8, 1933, withdrawals of $50; interest computed to be $9.06.

May 9, 1933, withdrawals of $50; interest computed to be $9.06.

October 26, 1933, withdrawals of $50; interest computed to be $7.66.

The aggregate calculation of interest is $3,049.95.

136 *Carl H. Vanvick, for Plaintiff—Cross.*

Q. Will you give us the total amount of withdrawals?
A. The total amount of withdrawals was $16,590.75.
Q. How much is half of that? A. $8,295.38.

Mr. Moore: You may examine.

Cross examination by Mr. McAneny:

Q. When you speak of withdrawals, you mean the moneys paid by the bank on the checks that are now in evidence; is that correct? A. That is right.

137 Mr. McAneny: That is all.

Mr. Moore: Mr. McAneny, will you stipulate that during the existence of the Firemen's Pension Fund account the bank pledged with the City of Yonkers as security for the repayment of the account and security for certain other accounts bank assets consisting of various bonds?

Mr. McAneny: I prefer that you put them in the record.

The Court: They are specified in your complaint there.

Mr. Moore: Yes, they are specified in the complaint.

138 The Court: Some of them are disputed?

Mr. Romm: We have a schedule of the bonds which conforms to the City's answer. There is no dispute about it now.

Mr. Moore: This conforms to your answer?

Mr. McAneny: I think they do.

Mr. Garrity: Pledged with the City of Yonkers.

Mr. Moore: I offer in evidence a schedule of the assets of the First National Bank and Trust Company of Yonkers pledged with the City of Yonkers.

Mr. McAneny: I object to that as not proved.

Mr. Moore: All right.

(Discussion between counsel off the record.)

Mr. Romm: That conforms with your claims in the answer. It schedules the items the City said were not pledged.

Mr. McAneny: Yes.

(Marked Plaintiff's Exhibit No. 5.)

Mr. McAneny: It is understood that that pledge covers this fund; is that so?

Mr. Moore: Yes.

The Court: The amount given here is $535,000.

Mr. Moore: Mr. McAneny, will you stipulate that the pledge of the assets by the First National Bank and Trust Company of Yonkers to secure the deposit account captioned "Firemen's Pension Fund," as shown in Plaintiff's Exhibit 5 in evidence, was not made pursuant to or under any statute of the State of New York and was not made pursuant to or under any local law or ordinance of the City of Yonkers?

Mr. McAneny: Certainly not.

Mr. Moore: That is all, Mr. Vanvick.

(Witness excused.)

Mr. Moore: The plaintiff rests.

The Court: The plaintiff rests.

Mr. McAneny: I move to dismiss the complaint on the ground that the plaintiff has set forth and proved no facts sufficient to constitute a cause of action in this proceeding. There was absolutely no proof of insolvency. Furthermore, under the existing law and decisions with respect to a situation such as this, these moneys were paid out by the bank in due course, apparently, and there has been absolutely no demand ever made for the return of these moneys at any time. Certainly on that point alone

142 *Motion to Dismiss the Complaint:*

the plaintiff has failed to make out a case, inasmuch as Section 244 of the Second Class Cities Law and Section 64 of that Law, and other laws applicable to the City of Yonkers, require that before any claim or any judgment can be entered against the City a claim must be duly filed in accordance with the provisions of those laws.

The case as it exists is simply a case of a bank having to make payments, not to the depositor, but to outside parties, and having honored the checks, 143 having never made any demand for the return of the money, and having shown no reason for such return so far as this defendant is concerned, in view of the fact that the plaintiff is demanding the return of the moneys apparently on the ground of insolvency. I do not know of any other grounds. And having failed to prove insolvency, the plaintiff is out of court on that point.

I therefore ask that your Honor dismiss the complaint. The law also requires, the State Law, notice of intention to sue, and that action must be commenced within one year after such notice is filed.

144 The Court: What do you say on the question of notice?

Mr. Romm: Our position is that the sections cited by counsel for the City do not refer to a claim of the kind in suit. They refer more specifically to claims for work done for the City, personal injury accidents, property suits, and so forth, and not a claim of the character we are suing on.

The Court: They do specify the particular nature of the claims?

Mr. Romm: As I recall it—I have not read those sections within recent times—it might be worth while to look at them, if your Honor sees fit to do so.

The Court: I will see what the defendant claims as to that. What is the provision as to the presentation of claims? 145

Mr. Rosenwasser: Section 244 of the Second Class Cities Law of the State of New York reads as follows:

(Omitted for brevity.)

I am reading the entire section.

The Court: Do you have anything about any general provision? 146

Mr. Rosenwasser: I have not read it all. (Reading):

(Omitted for brevity.)

That is all from Section 244.

Then there is Section 64, entitled (reading):

(Omitted for brevity.)

Mr. Romm: As to Section 244 of the Second Class Cities Law, which was read by Judge Rosenwasser, it seems apparent from a reading of it that that specifically applies to injuries to persons or property arising from negligence. 147

The Court: That section does not apply. How about 64?

Mr. Romm: The last one, Section 64 of the Second Class Cities Law, that does not apply to the plaintiff at all, your Honor, because it states, in substance, that a claim must be filed with the proper bodies or officers of the City after the claim has been approved, or, rather, after the claim has been approved by a head of the department or officer of the city who hired the claimant. In other words, by those words it could not possibly apply to the plain-

tiff in this case, because manifestly there is no officer or head of any department in the City of Yonkers who would approve our claim so we could file it with the proper authorities. That section applies to situations where a man does work of some kind for the City of Yonkers or supplies material to it.

And, further, you see that this amounts to a failure to file a claim by giving notice, which is for the first time stated by the corporation counsel in his motion, has never been set up, and that is necessary to this suit. It is our position that it is well established that a defense of that kind must be affirmatively pleaded so it could be heard by the Court.

Mr. McAneny: The complaint alleges that there has been a due demand. That is denied, absolutely, which gives an absolute issue on that point. There has not been any demand even proved in this case.

Mr. Romm: Letters have been sent.

Mr. McAneny: I move to strike that out.

The Court: What is that?

Mr. McAneny: I move to strike out the remark of counsel that letters have been sent.

Mr. Romm: And mailed to the defendants.

Mr. McAneny: Do not interrupt me.

Mr. Romm: I was trying to answer the Judge.

The Court: Let the Corporation Counsel proceed.

Mr. McAneny: You did allege due demand. It was denied. You have proved no demand whatever, and, furthermore, you proved no due demand under the law.

The Court of Appeals has held that that provision which bases a claim against the city applies to every kind of action, legal or equitable. The case of *Thomann* v. *The City of Rochester*, 256 N. Y. 165,

disposes of that question and the City cannot be held liable without such a claim except on a fixed claim, fixed by contract or a fixed salary or fixed in some way so that the comptroller might be mandamused to pay it; that on any claim upon which there is no fixed liability, upon which a mandamus would not lie, it is required by law that a claim be made.

No such claim has been made in this case and no demand whatsoever. I think if your Honor will read that case I just cited and others we are going 152
to submit to you you will find that that is a fatal defect in the plaintiff's case. The proof of filing the claim is a condition precedent which does not require that it be set up affirmatively. That is one of the points upon which we argue.

We further argue that there has been no insolvency shown, as against the defendants in this action. No insolvency, under the National Banking Law, may be deemed to exist with reference to the ordinary transactions of a bank, that is to say, as between the bank and its depositors. This money is in the bank and they may have closed down and paid it out. It is necessary that they show as a matter of fact that 153
it was paid out while it was actually insolvent. We do not admit that the bank was ever insolvent or that it is insolvent today, as a matter of fact.

Furthermore, we move to dismiss on the ground that the plaintiff would not be entitled to recover anything without a tender back of the securities.

The Court: Would not it be better to withhold action on your motion?

Mr. McAneny: I think so, so that we can submit a brief on the law.

154 *Stephen A. Roake, for Defendants—Direct.*

The Court: So we can dispose of these questions. It does involve a question of a claim and presentation of a claim. So I think it is better to withhold my decision on your motion for the present and hear the defendants' case. It probably won't be very long.

Mr. McAneny: You reserve decision?

The Court: Yes, I reserve decision.

Mr. McAneny: Shall we take an adjournment at this point?

The Court: Yes, two o'clock.

155 (Recess to 2:00 P. M.)

AFTERNOON SESSION.

2:00 P. M.

STEPHEN A. ROAKE, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

156 Q. Mr. Roake, are you an official connected with the City of Yonkers? A. I am.

Q. In what capacity? A. Assistant Cashier, Department of Finance.

Q. How long have you held that position? A. Well, as assistant cashier, I have been in that capacity since about 1922 or 1923.

Q. Continuously up to the present time? A. That is right.

Q. Who in the Department of Finance has charge of Firemen's Pension matters, including deposits and withdrawals? A. I have.

Q. For how long have you had that position? A. Ever since I have been assistant cashier.

Q. You now are doing that work? A. Yes, sir.

Q. You are familiar with all the facts with regard to deposits and withdrawals? A. I am.

Q. Can you tell me what the last deposit was that was made in the First National Bank and Trust Company on account of the Firemen's Pension Fund prior to March 3, 1933? A. On February 28, 1933.

Q. I show you a check and I ask you if that represents the deposit that you refer to? A. Yes, sir. 158

Q. What is the amount of that check? A. $15,570.06.

Q. Was that the last deposit that was made in that fund? A. That was the last deposit made in the bank in that fund.

Q. Will you tell me what that check represents? A. That check is the 1932 contribution by the City to the Firemen's Pension Fund. It represents about 3 per cent of the —at least one and one-half times the amount contributed by the members of the Fire Department.

Q. That amount, was that contributed in accordance with the terms of the Local Law? A. Yes.

Q. That check was made up and so deposited? A. Yes, sir. 159

Mr. McAneny: I would like to offer that check in evidence.

Mr. Moore: Let me see the check, please?

(Check handed to Mr. Moore.)

Mr. Moore: No objection.

(Marked Defendants' Exhibit B.)

Q. That check, Defendants' Exhibit B, was drawn against the Westchester Trust Company, was it not? A. Yes.

160 *Stephen A. Roake, for Defendants—Direct.*

Q. Was that drawn against that general fund? A. Yes.

Mr. Moore: I object as irrelevant, incompetent and immaterial. The check is in evidence and speaks for itself.

Mr. McAneny: I think he is entitled to state out of what fund that check was drawn.

The Court: What does the check show? It seems to be drawn on the Westchester Trust Company.

Mr. Moore: The check speaks for itself without his characterizing what fund it came from.

161 Mr. McAneny: If he knows, he can testify.

The Court: The check appears to be drawn on the Firemen's Pension Fund, drawn on the Westchester Trust Company.

I will permit him to answer it. What is your answer?

Mr. Moore: Exception.

Mr. McAneny: You may answer?

The Witness: The question?

Q. Was that check drawn against the general funds of the City? A. It was.

162 Q. When that check was deposited in the First National Bank and Trust Company, what then was the balance of the fund in that bank?

Mr. Moore: Do you know without referring to some record?

The Witness: I cannot memorize figures. I know approximately.

Q. You can refer to your records and testify. A. I have my own memorandum. Our balance on February 28th was $19,938.68.

The Court: That is in the Westchester Title Company?

The Witness: In the First National Bank, Firemen's Pension Fund, after that check drawn on the Westchester Trust Company was deposited.

The Court: The balance was how much?

The Witness: $19,938.68.

Q. Will you examine Defendants' Exhibit A, consisting of certain checks, and can you tell me what those checks were drawn to pay for (handing to witness)? A. Those checks were all drawn to pensioners of the Firemen's Pension Fund with the exception of one, the last check. 164

Q. With the exception of the last check? A. The last check.

Mr. Moore: What check is that, Mr. Roake?

The Witness: Check No. 1948 was drawn to the order of the Firemen's Pension Fund and that constituted our balance at the time deposited in the bank.

The Court: What is the date of that check?

The Witness: May 2, 1933.

Q. What is the amount of that check? A. $5,636.02.

Q. Mr. Roake, are you familiar with the securities that were deposited as a pledge by the First National Bank and Trust Company with the City of Yonkers? A. I am familiar with it, but that was always handled by the deputy comptroller or deputy treasurer at the time. 165

Q. Can you tell us from your knowledge or your records what the amount of that security was in par value as of March 3, 1933?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

The Court: It does not seem that you have laid the ground for that.

166 *Stephen A. Roake, for Defendants—Cross.*

Mr. McAneny: I withdraw the question.

The Court: The question of materiality is another question, but the foundation has not been laid for it.

Mr. McAneny: Cross examine.

Cross examination by Mr. Moore:

Q. Is there anything on this Defendants' Exhibit B, which is a check for $15,570.06, dated February 28, 1933, and drawn on the Westchester Trust Company of Yonkers,
167 New York, which indicates from the check itself on what fund it is drawn? A. No, sir. Can I answer that question? From what fund it is drawn? It is drawn from the City of Yonkers General Fund, but what particular account the check does not signify.

Q. The check does not signify on what particular account it is drawn? A. But it is drawn on the City of Yonkers' General Fund.

Q. How do you know that? A. Because we only have one general fund.

Q. Mr. Roake, did the City of Yonkers have deposits in other banks besides the First National Bank? A. Yes, sir.

168 Q. What other banks in the City of Yonkers did they have deposits in? A. At the time?

Q. Yes. A. The Westchester Trust Company, the Central National Bank, Yonkers National Bank and Trust Company.

Q. Did you have firemen's and policemen's funds, pension funds, in various banks? A. At the time they were all in the First National Bank.

Q. That check of $5,000-and-something, drawn out in May, 1933, where was that deposited? A. It was deposited in the Central National Bank, where the account was opened at the time.

Mr. Moore: That is all.

Re-direct examination by Mr. McAneny:

Q. You spoke of the City having an account in the Central National Bank of Yonkers. Did the City hold securities for its deposits in that bank?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

Mr. McAneny: You have opened it up. You inquired as to the other banks.

The Court: I think it goes further than that.

Mr. McAneny: What is that? 170

Mr. Moore: Yes.

The Court: I do not think the question of its security at the other bank has anything to do with the question here.

Mr. McAneny: The question arises in a great many cases affecting the cases involved in this case as to what the practice of the bank was and the custom. It seems to me it is entirely relevant. Such questions have been framed in the cases that have already been determined by the higher courts, including the United States Supreme Court. They have gone on the question of practice.

The Court: If you are able to show me any such 171 holding, I will be glad to listen to it. The practice is different in different cases. What you are seeking to show is that the fact that deposits were made in other instances has some bearing on the question of this fund being public funds, you mean?

Mr. McAneny: It has bearing on the question as to whether it was the practice in this jurisdiction to permit national banks to pledge securities for public funds.

Mr. Moore: I object to it, your Honor.

The Court: You mean it is distinct from any other district?

172 *Stephen A. Roake, for Defendants—Re-direct.*

Mr. McAneny: Oh, yes, I think it is a question as to the practice in each particular district as to whether or not—in other words, the question of practice of the bank in each particular district has a bearing on the question as to whether or not any particular national bank in that district has the right under the law to pledge its securities for public money.

The Court: I will receive the proof. I do not see that it has any bearing in that respect.

173 Mr. Moore: May I have an exception?

The Court: Yes. I think it should be received.

Q. What is your answer to that?

The Court: I will permit the answer.

Mr. McAneny: Would you mind repeating the question?

Q. (Read by the stenographer.)

The Court: If you know.

A. Yes, sir, the City held securities for deposits in all
174 banks.

Mr. Moore: I move to strike out the answer.

The Court: Yes.

Q. In this particular bank? A. In the Central National Bank the City held securities.

Q. For the full amount of the deposit?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

Mr. McAneny: I withdraw the question.

Q. The Westchester Trust Company is such an institution, is it not? A. I beg your pardon?

Q. The Westchester Trust Company is such a bank? A. I believe it is.

Mr. Moore: Do you know whether it is or not, Mr. Roake?

The Witness: I do not know as I can say I have any authentic knowledge of it.

Q. At any rate, the Westchester Trust Company also pledged securities to the City for its deposits?

Mr. Moore: I object to that as incompetent, ir- 176
relevant and immaterial, your Honor.

Mr. McAneny: The same question affects city banks, with regard to the practice.

The Court: It does not seem to me that it is ipetent.

Mr. Garrity: May I explain that point?

The Court: What do you say?

Mr. McAneny: I do not want to urge any question that you think is not competent, but I think that it has been a question in a great many cases as to what the practice was and I think has considerable control upon the rights of national banks under the 177
National Banking Act to pledge securities. With that in view, I think we are entitled to show what the situation was in our own city with respect to pledges by national banks and state banks of that city. In several cases the United States Supreme Court has gone very fully into the question of the local practice. I have a case here that I would like to have you read.

Mr. Moore: I have the entire section 90 of the United States Annotated, Title 12, and it is provided there that a national bank may be permitted to give securities for deposits where there is a state or local law on that subject permitting said deposits.

178 *Stephen A. Roake, for Defendants—Re-direct.*

Mr. McAneny: That is not a fact. Will you kindly read that law? It does not say anything of the kind.

Mr. Moore: Will you wait a minute?

Mr. McAneny: I do not like to have the record encumbered by a statement that is not a fact. I object to it.

The Court: Let's hear counsel for the plaintiff first.

Mr. Moore: I will read it. The only part of this
179 Section 90 which is relevant—it is quite a long section—is the last paragraph:

"Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

Mr. Garrity: With reference to the question of the relevancy of the practice in other banks in the State of New York, I refer you to the case of Hallewell *v.* The Town of Hempstead, a case decided by
180 the Federal Court, 10 Fed. Supp. 771. That was a case involving a national bank where the Judge found no local statute and went to the public policy of the State of New York in determining whether or not a national bank could pledge its assets to secure public funds. The record shows that the Judge took evidence as to the custom in the State of New York, both as to cases and customs existing at the present time. Therefore I respectfully submit that we have the right through the witness to show that in the City of Yonkers in other banks the City of Yonkers secured deposits or the banks pledged securities to

secure the public deposit of the City of Yonkers, as part of the general custom of the City. It was also the general custom of the State of New York.

It is our contention that not only is it the custom in the State of New York but by statute it is the determined policy of the State of New York to allow a pledge of the securities of such a bank to secure public money; and by the same token, following up Section 90, a national bank in the State of New York would have a right to pledge its assets to secure public funds.

182

The Court: The question here is whether those are public funds. Isn't that the question?

Mr. Moore: That is one of the questions.

Mr. McAneny: That is one question. If it be a fact that they are public funds, then we are entitled to show what the practice is.

The Court: Assume it was found that they were public funds, what do you claim the status of the plaintiff would be?

Mr. McAneny: Then we maintain that since they are public funds that Section 90 of the National Banking Act permits a national bank to pledge its securities for such deposits, and that in the State of New York the rule is that such pledges are allowable and permissible by state banks.

183

The Court: That is your contention. What is the answer to that argument? If it were found that those were public funds, then what point is involved? What is the point involved with regard to recovery here?

Mr. Romm: If you find that is is a public rather than a private fund, we still maintain that the pledge of the assets by the bank to secure that "public" deposit account was *ultra vires*.

The Court: What is the basis of that?

Mr. Romm: Section 90, which has been spoken of, says in substance that a national bank may pledge assets to secure public funds if the state banks located in the state where the national bank is located are so permitted by the law of the state.

The Court: Are they so permitted under the laws of New York State?

Mr. Romm: We claim it is not so permitted. In urging that claim I rely on the absence of any statute, the absence of any local law or ordinance of the City of Yonkers, and on the two decisions of the highest court of the State of New York, which indicates very clearly that in order to permit or in order to have pledged the bank's assets in New York State to secure public funds, it must be authorized, a statute must be passed specifically authorizing the pledge.

The Court: There is no general statute on it?

Mr. Romm: No, there is none here.

As to the attempt of the City of Yonkers to introduce evidence of a common practice, we claim that any such fact in this case would be incompetent, irrelevant and immaterial for these reasons:

First, Section 90, which is the statute to which we go back in getting an answer to the problem before the Court, says: "Such as is permitted by the law of the state where the national bank is located." I cannot by any stretch of the imagination conceive of the proposition that common practice represents the law.

Secondly, the decision in the case of the State Bank of Commerce *v.* Stone indicates that the statute is necessary in order to give the power.

Third, because the Supreme Court in The City of Marion *v.* Sneeden definitely says that in order to give the power the state must have either a statute or a decision of the highest court of the state. Meaning in effect that the law calls for either a statute or a decision of the highest court.

This case of Hallewell *v.* The Town of Hempstead, read by Mr. Garrity and stated to be of the same general character, there the District Judge did permit the introduction of evidence as to practice. That case was never carried any further. I am informed that it was subsequently settled. That case 188
was decided by the District Judge prior to the important decision which was later decided by the highest court of this state in the City of Mount Vernon *v.* The Mount Vernon Trust Company. The Judge there found that the law of the State of New York permitted the Hempstead National Bank to pledge its assets in order to secure the deposits of The Town of Hempstead because there was a practice, despite the statement by the United States Supreme Court in the Sneeden case that the way to determine that is to look for the state statute or the decision of the highest court of the state. 189

Mr. McAneny: I do not know whether you want to hear further argument on that point. But I can only say that my friend's construction of the testimony in this case is very narrow and not warranted by the case itself. We do not get very far arguing that. In the present case that point becomes a very crucial point in this case as to whether or not they had the right to make the pledge and then pay the money back upon getting the pledge back. That is one of the questions of law involved in the case.

I can only say that not later than December 13th last the United States Supreme Court handed down

a decision covering Section 90 of the National Bank Act, which was very broad in its language and very clear and very convincing, and I believe it brushes aside any ambiguity with regard to the construction of Section 90. The highest court of the State of New York in the very case my friend cites substantiates our theory. If you will just read several paragraphs of that case that I can point out to your Honor, you will see that the Court of Appeals of the State of New York clearly supports our contention in this case by its actual decision in the Mount Vernon case.

The Court: Do you propose to follow this up and show other deposits similarly secured?

Mr. McAneny: I asked these questions because it was opened up by my friend Judge Moore, when he asked whether we had deposits in other banks in the city has left the way open to my showing the nature of the deposits and how they were regarded.

The Court: I doubt whether that would do it so far as the fundamental question of that kind is concerned, on the ground that he had opened up the subject.

Mr. McAneny: I think as a matter of fact and a matter of law I would have a right to ask these questions independently of any opening up of the situation, and I wish to put this in the record to substantiate my point, and also I refer to the court decisions showing the practice in the State of New York.

The Court: I am going to receive it subject to being stricken out later on.

Mr. Moore: Will you make that same ruling with regard to the other questions asked about the Central National Bank?

The Court: Yes. You may answer, Mr. Roake.

Q. The question was, Mr. Roake, whether the accounts covering the city deposits in the Westchester Trust Company were secured by collateral pledge by that company? A. They were.

Mr. Moore: I move to strike out the answer.

The Court: I will deny the motion for the present—reserve decision on the motion.

Mr. Moore: May I have a blanket objection to any other banks or institutions of that kind? That will save me interrupting.

The Court: It seems to be based on the claim that 194
you open up the subject. That includes the two banks, the Central and the Westchester. Very well.

Mr. McAneny: That is all.

Mr. Moore: That is all, Mr. Roake.

(Witness excused.)

GUSTAV W. KLEIN, JR., called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. McAneny: 195

Q. Mr. Klein, are you an official of the City of Yonkers? A. I am.

Q. What position do you hold? A. Deputy Comptroller, Department of Finance, City of Yonkers.

Q. How long have you had that position? Since what time? A. Since January 1, 1934.

Q. Prior to January 1, 1934, what position did you hold? A. I was City Treasurer of the City of Yonkers.

Q. How long did you hold that position? A. From January 1, 1932, to December 31, 1933.

196 *Gustav W. Klein, Jr., for Defendants—Direct.*

Q. Since December 31, 1933 the position of City Treasurer was abolished? A. Yes; due to the consolidation of the Comptroller's office and the Treasurer's office.

Q. It was after that consolidation that you were appointed Deputy Comptroller? A. That is right.

Q. As City Treasurer, what were your duties? A. The duties of City Treasurer are to see that the checks were countersigned in conjunction with the Comptroller, to see that the moneys were properly deposited and also the policy of the department was to see that the securities in the
197 banks——

Mr. Moore: I move to strike out what the policy was of the Treasurer.

Mr. McAneny: Yes. Strike it out.

Q. What were your duties? A. To see that the proper security was at all times in our safe deposit vaults to protect the public moneys deposited in the various banks that the City of Yonkers deposited money in.

Q. You have heard it testified, have you not, that the City of Yonkers held certain securities that had been deposited with it by the First National Bank and Trust Com-
198 pany? You heard that testimony? A. Yes, sir.

Q. As of March 3, 1933, do you have a list of those securities? A. I do.

Q. Could you state the amount of those securities in par value as of that date?

Mr. Moore: I object to it as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Moore: Exception.

The Court: You mean the total?

Mr. McAneny: Yes.

The Witness: Answer the question.

The Court: Yes.

A. The total par value was $535,000.

Q. Were those securities segregated to various accounts or were they held under one control? A. They were held under one control.

Q. In other words, you did not have to apportion and segregate the Firemen's Pension Fund to any other general account, but they were held by the City under the same agreement of deposit? A. They were.

Mr. Romm: We object to the characterization "agreement of deposit." There is no proof in the case of any agreement of deposit here. 200

Mr. McAneny: I withdraw that.

The Court: Yes.

Q. They were really turned over to the City by the bank without any statement as to what particular fund they were allocated to? A. Yes, they were in separate safe deposit boxes, not in one box, but they were there under the control of the City of Yonkers.

Q. They were in separate safe deposit boxes for convenience? A. Yes.

Q. They were not segregated to any fund? A. No, sir; they were not. 201

Q. Have all of those securities been returned to the First National Bank or its representative? A. They have, with the exception of, I think there is—I am not positive of that—either a $1,000 or two $500 bonds that are still being held. I know the amount is $1,000. What the denomination is I am not certain at this time.

The Court: Have you any memorandum made by the First National Bank showing what the receipt he gave the bank was, or a memorandum that is given in connection with the deposits?

The Witness: In reference to the securities?

202 *Gustav W. Klein, Jr., for Defendants—Direct.*

The Court: Yes.

The Witness: Yes, every time the bank would——

The Court: You have such a memorandum?

The Witness: Yes.

Q. What does that record consist of?

Mr. Romm: I object. That is not the best evidence. Let's have the records before the Court.

The Court: That is true.

Mr. McAneny: The Court brought it out.

203 The Court: I brought it out in connection with the prior inquiry. The instrument is the best evidence.

Q. Have you got the records on that? A. Yes, I have.

Q. Will you show them to me? A. (Witness hands to counsel.)

Q. You show me certain papers, Mr. Klein. By whom were those papers delivered to you? A. These are receipts signed by Mr. Trudeau, who was Conservator of the First National Bank, giving back securities that we had in our safe deposit boxes.

204 Mr. Romm: Will you read the question?

(Question read by stenographer.)

Mr. Romm: I move to strike out the answer as not being responsive.

The Court: I was referring in my inquiry to the original deposits when originally there was some receipt given by the City to the bank or some memorandum showing the deposits made by the bank as security for those payments. In fact, it was made to pay back the City.

Mr. McAneny: I will get to that.

The Court: All right. This point is not in the suit, this question about the receipt. The receipt was given by the Conservator.

Mr. Moore: We received the securities back.

The Court: The receipt was given by the Conservator to the City.

Q. Mr. Klein, you say that these receipts were handed to you by the Conservator, Mr. Trudeau? A. Yes, after we had delivered and turned back to him the bonds for that amount. He gave us a receipt in every instance. 206

Mr. Romm: I move to strike out any portion of the answer that is not responsive.

The Court: The question was whether this receipt was given to you by Mr. Trudeau.

Mr. Romm: The answer on that is yes or no.

The Witness: Yes, your Honor, delivered to me by Mr. Trudeau.

Mr. McAneny: I offer them in evidence. Will you just read them (handing to Mr. Moore)?

Mr. Moore: I object to this as incompetent, irrelevant and immaterial. We have received the bonds. 207

The Court: I will receive it. $535,000; is that the amount?

Mr. Moore: I haven't figured up the amount. I assume that is correct.

The Court: $534,000.

(Marked Defendants' Exhibit C.)

Q. Mr. Klein, will you just read those receipts?

The Court: Is there any question about this, Mr. McAneny? They all seem to agree, except the $1000.

208 *Gustav W. Klein, Jr., for Defendants—Cross.*

There is $534,000. There is no question about this. What is the necessity of reading that?

Mr. McAneny: The securities were turned over and these receipts were delivered to him, and the language of the receipt is to my mind of some importance.

The Court: They are received in evidence.

Mr. McAneny: Yes. I think I would like to have it done inasmuch as we have no jury.

The Court: I do not think it is necessary to read all the items of that receipt. There can be no question about the particular bonds.

209

Q. If you will just read the substance of the receipt into the record? A. The bottom paragraph states: "Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers. (Signed) Percival W. Trudeau, Conservator, First National Bank and Trust Company, Yonkers, New York." This one is dated March 28, 1933.

Q. They are all similar? A. Yes, sir.

210 Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. How long were you Treasurer of the City of Yonkers? A. From January 1, 1932 to December 31, 1933.

Q. Have you in your files or anywhere any pledge agreement made by the officials or directors of the First National Bank and Trust Company of Yonkers relative to the deposit of the City of Yonkers? A. Not that I know of.

Q. Was there any written pledge agreement made between the City of Yonkers and the directors or officers of the First National Bank and Trust Company of Yonkers?

Mr. McAneny: I object to that unless it is within the knowledge of the witness.

The Court: I presume that it is.

Q. (Continuing). Within your knowledge, during the time that you were City Treasurer, was any such pledge agreement ever entered into? A. Not that I know of.

Q. May I see that last exhibit? A. (Witness hands to Counsel.)

Mr. Moore: That is all.

212

Re-direct examination by Mr. McAneny:

Q. When you first became City Treasurer, did you say it was January 1, 1932? A. That is right.

Q. Since that time do you know of your own knowledge that the banks that you have testified to all gave securities to the City for their deposits?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

Mr. McAneny: I am asking him for the duration of the time that was within his knowledge.

Mr. Moore: I am objecting to it, your Honor. It has no useful purpose as far as I can see in this case. I object to it as incompetent, irrelevant and immaterial, the same objection as the other one that was raised. 213

The Court: I will receive it with the reservation I made before. You may answer.

A. Yes, all the banks that the City deposited money with were secured by the securities of the banks.

Mr. Moore: I move to strike the answer out.

The Court: Motion denied.

Mr. Moore: Exception. That is all, Mr. Klein.

(Witness excused.)

14 *Gustav W. Klein, Jr., Recalled—Direct.*

GUSTAV W. KLEIN, JR., recalled, further testified as follows:

Direct examination by Mr. McAneny:

Mr. McAneny: I would like to include the resolution of the Board of Estimate and Apportionment and the sections of the law that were referred to, Section 69 and Section 70 of the Second Class Cities Law and the testimony to the effect that Mr. Roake was a member of the City Department and then in addition 15 that he qualified in that case, along the same lines. I would like to offer in evidence in this case the claim upon the check which has been offered in evidence here was paid, and I would like the witness to identify it.

Mr. Moore: I object to all this upon the same ground that I objected to it in the Police Pension Fund case, on the ground it is incompetent, irrelevant and immaterial.

The Court: I understand you do not object to the reopening of the case for the purpose of offering this testimony?

16 Mr. Moore: No, I have no objection to that.

The Court: Subject to your right to raise the objection which you have raised in this Police Pension case to the similar testimony, notwithstanding the fact that it is received, the objection is overruled and an exception noted.

(Resolution marked Defendants' Exhibit C-1).

Mr. McAneny: I would now like to read into the record a section of the Second Class Cities Law, Sections 69 and 70 of the Second Class Cities Law, which is a law covering the City of Yonkers.

Mr. Garrity: Second Class Cities Law of 1909, Chapter 55, as Amended:

(Omitted for brevity.)

Mr. Moore: I move to strike out the two sections that have just been read as incompetent, irrelevant and immaterial.

The Court: Are you offering the copy of these acts themselves?

Mr. McAneny: The laws themselves. I am sure that the Court takes judicial notice of the State laws. 218

The Court: If that were true, a motion to strike out is not necessary.

Mr. Romm: They read it into evidence, that is why the motion is made.

The Court: Motion denied.

Mr. Moore: Exception.

Mr. McAneny: I ask counsel for the plaintiff to concede that the Yonkers Trust Company and the First National Bank and Trust Company subsequent to this resolution were consolidated and merged.

The Court: What is the date of that?

Mr. McAneny: And the consolidation agreement filed in the office of the Register of Westchester County. Date of merger is September 30, 1929. Do you concede that? 219

Mr. Moore: There was another bank, the Bryn Mawr-Nepperhan. Those three were consolidated and became known as the First National Bank and Trust Company of Yonkers on September 30, 1929.

Mr. McAneny: The consolidated bank, you will concede, assumed all the obligation of the constituent banks.

Mr. Moore: I cannot concede that. I do not know.

220 *Stephen A. Roake, Recalled—Direct.*

Q. Subsequent to that consolidation, Mr. Klein, did you continue to carry accounts of the City in the First National Bank and Trust Company? A. I did.

Mr. McAneny: I will just ask to have this warrant and claim identified by Mr. Klein, if I can.

Q. Can you tell us what this covers? A. Warrant drawn on the City Treasurer for the payment of the Firemen's Pension Fund for the year ending December 31, 1932, members contribution $10,380.04——

221 Mr. McAneny: You do not need to read it. It is the same wording as the other.

The Court: I think that is in the proof already, as far as the amount is concerned and the amount paid.

Mr. McAneny: I will offer that in evidence in this case.

The Court: Mark it.

(Marked Defendants' Exhibit D.)

Mr. McAneny: That is all.

(Witness excused.)

222

Stephen A. Roake, recalled, further testified as follows:

Direct examination by Mr. McAneny:

Q. I believe you have testified, Mr. Roake, that you had charge of the accounts of the Firemen's Pension Fund; is that so? A. Yes, sir.

Q. Under the law, the Local Law, which has been put in evidence, it was incumbent upon the City, was it not, to deposit into that fund certain moneys to cover deficits? A. Yes, sir.

Mr. Romm: I object upon the ground that it is a conclusion of law.

The Court: Sustained.

Mr. Romm: It speaks for itself.

Mr. McAneny: I am just leading up to the question.

The Court: Objection sustained.

Q. The City of Yonkers—did the City of Yonkers make certain payments into that fund? A. Yes, sir.

Q. From year to year? A. They did. 224

Q. What did those payments cover? A. The payments were one and one-half times the contribution of the employees to the deficit at the end of each year.

Q. As prescribed by the local laws? A. Yes.

Q. Can you tell me what those payments were for the years from 1931 on? A. The deficits?

Q. Yes.

Mr. Moore: I object to this as incompetent, irrelevant and immaterial, your Honor.

The Court: No, I think it may have some bearing on the question. You are speaking now of the amount of deficit after the payment of 1½ per cent? 225

The Witness: Yes.

The Court: All right. By years, Mr. McAneny?

Mr. McAneny: By years, yes.

A. Deficit on December 31, 1931 was $3,429.53.

Mr. Romm: December 31, 1931?

The Witness: That is right.

A. (Continuing) December 31, 1932, the deficit was $6,790.66; $27,591.75 for 1933.

Q. What year was that? A. 1933.

Mr. Romm: What date in that year?

The Witness: December 31st.

Mr. Moore: I object. That fact was taken up by the payment, your Honor.

The Court: How is it material then, Mr. McAneny?

Mr. Moore: I move to strike out the answer, the last part of the answer, so far as it refers to the deficit in 1933.

Mr. McAneny: I am entitled to show what the City actually paid into this fund. We are now trying the case here to determine the character of this fund.

The Court: In so far as these deposits were a part of the fund in question I am receiving it. Beyond that I won't do it.

Mr. Moore: This last payment was not in our bank at all. It had nothing to do with the fund, so far as our bank was concerned.

The Court: How did that happen? Paid some other bank?

Mr. Moore: Paid into some other bank. Our bank closed on the 3rd of March, 1933 and they had received all their money from our bank by the 16th day of December, 1933. Now he has testified as to the deficit on December 31, 1933, which was two weeks after we paid them out. We paid them and closed up. What the deficit was in 1933——

The Court: I do not see that it is relevant here.

Mr. McAneny: I think it is important that you know the character of this fund. The First National Bank and Trust Company carried this as the City of Yonkers Firemen's Pension Fund. They were fully aware of the law. They could see the actual facts, how that fund has been handled by the officials of the City. It seems to me that has a bearing on the characterization of the fund.

The Court: I do not think so. I will sustain the objection.

Mr. McAneny: I take an exception.

The Court: Anything further?

Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. Mr. Roake, was this fund paid by the City with donations to the fund of the Firemen's Pension Fund?

Mr. McAneny: I object to that question. I do not think it is quite clear. Would you mind repeating it? 230

The Court: He wants to know where this money came from that the City deposited in that fund.

Mr. McAneny: I think he has testified they were deposited pursuant to law.

Mr. Moore: No.

Q. Were they deposited pursuant to law? A. Yes, sir.

Q. And the law required that a donation equal to one and one-half times the amount paid in by the firemen be added to the fund every year?

Mr. McAneny: I object to the word "donation." There is nothing in the law about donation. It is not a donation. 231

Q. Was one and one-half times the deficit deposited in the Firemen's Fund each year? A. Yes, sir.

Q. By the City? A. Yes, sir.

Q. Pursuant to law? A. Yes, sir.

Q. You are the only one that has charge of that fund in your office? A. I have full charge of the cash end of it. There are bookkeepers, of course, taking care of their records.

232 *Stephen A. Roake, Recalled—Cross.*

Q. Who holds the fund as trustee?

Mr. McAneny: I object to that.

Q. Who has charge of the fund? Who holds the fund?

Mr. McAneny: I object to that as calling for a conclusion.

Mr. Moore: He knows all about it. He had charge of it. He may be able to tell us who had supervision over this fund.

233 Mr. McAneny: I object to that. He is not qualified. He has testified as to who acts as treasurer. That is all.

Q. Have you testified that you are in charge of the Firemen's Pension Fund for the Comptroller of the City of Yonkers? A. I received all the cash and supervised disbursements upon the authorization of the Comptroller or Trustees.

Q. Do you know who the Trustees are of the fund? A. The Commissioner of Public Safety, the Mayor and Comptroller.

Q. This fund was made up according to the schedules
234 of law that were read here this morning and introduced in evidence? A. Yes, sir.

Mr. Moore: Contributions, shall I say, Mr. McAneny, by the City of Yonkers? Do you object to the word "donation"?

Mr. McAneny: I object to any characterization of this fund except that they were deposited according to law, as he has testified to.

The Court: He may answer this question: You said you had charge of the funds. The funds were paid directly to the bank, were they, and then they are checked out?

The Witness: Fees are in some cases paid to me in cash. I am bonded and I have full charge of the accounts, so far as the cash is concerned.

The Court: What payment would be made to you?

The Witness: Mortgage interest, and so on.

The Court: What was the nature of the payments that would be made?

The Witness: Mortgage interest on investments.

The Court: How did the firemen make payment to the association, directly?

The Witness: Their deductions are made from 236
the payroll and it is turned over to me and I deposit it in that particular fund.

Q. That fund is made up practically by deductions from the payroll of the firemen each month? A. Yes.

Q. By fines and the other various ways stated in the law that was read here this morning? A. Yes, sir.

Q. In addition to the 1½ per cent of the amount paid in by the firemen for the preceding year you would make up any deficit?

Mr. McAneny: Paid in by the firemen, did you say? 237

Mr. Moore: Paid in by the firemen.

Mr. McAneny: That is not a fact; paid in by the City.

Mr. Moore: The City pays one and one-half times as much as the firemen.

Mr. McAneny: Will you read that question?

(Question read by the stenographer.)

The Court: I think it all appears in the record.

Q. May I ask you just one or two questions? Once this money got into the pension fund of the firemen was it ever transferred back to the City? A. No, sir.

238 *Stephen A. Roake, Recalled—Re-direct.*

Mr. McAneny: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Moore: He has answered "No, sir." That is all.

Mr. McAneny: I ask to have the items corresponding to the items in Defendants' Exhibits F, G and H in the Police Pension Fund inserted in this record, as testified to by this witness, Mr. Roake, and I will ask him if he will read from the budgets of
239 1931, 1932 and 1933 the entries covering the Firemen's Pension Fund.

Re-direct examination by Mr. McAneny:

Q. Just give it for the year 1931. A. 1931 estimated contribution to Firemen's Pension Fund, $16,269.85.

The Court: What page is that?

The Witness: Page 58.

The Court: All right.

Mr. Moore: How did it read, Mr. Roake?

The Witness: Contribution to Firemen's Pension Fund.

240 Mr. Moore: I see.

A. (Continuing) 1932 estimate, page 2, contributions to Fire Pension Fund, $15,815.48.

Mr. Moore: Is that Fire Pension Fund or Firemen's?

The Witness: It should be Firemen's, but it says "Fire" here.

A. (Continuing) 1933 estimate, page 3, contributions to Fire Pension Fund, $16,032.29.

Mr. McAneny: That is all.

Re-cross examination by Mr. Moore:

Q. Mr. Roake, those were contributions made by the City to these funds, were they? A. Those were estimates of contributions to be made.

Q. Do the estimates and the actual amounts contributed there coincide? A. Very closely.

Q. Or agree as to amount? A. Very closely.

Q. That money once having been turned into either of those funds was never returned to the City, was it?

Mr. McAneny: Are you asking as a matter of fact or matter of law? 24

Mr. Moore: I am asking him whether he knows about it as a matter of fact. He has been there since 1922.

Mr. McAneny: You asked him if any money had been returned to the City by these funds or whether it should be returned by the City.

Q. I am asking you if when this money got into the Police or Firemen's Fund it became a part of that fund? A. It does.

Mr. McAneny: That is calling for a conclusion of the witness and is a matter of law. 24

The Court: I think that fact appears.

Mr. Moore: I do not think I will ask him any more. That is all.

Mr. McAneny: I ask that that question and answer be stricken out.

Mr. Moore: No, I think it should stand.

The Court: It may call for a conclusion if it does appear that these funds were deposited as contributions and deposited in a special fund. I think that is sufficient for the purpose.

244 *Motion to Dismiss the Complaint.*

Mr. McAneny: That is true.

The Court: I will strike it out; the motion is granted to strike out.

Mr. Moore: Exception.

Mr. McAneny: It is a question of law.

The Court: I understand that.

Mr. McAneny: That is all.

By Mr. Moore:

Q. Were those payments paid in the other years for the
245 year 1933? You have given us two checks and those were similar payments made in the two previous years 1932 and 1931. A. Yes, sir.

Q. They were? A. Yes, sir.

Mr. McAneny: That is all. The defendant rests, your Honor.

Mr. Moore: The plaintiff rests, your Honor.

Mr. McAneny: I renew my motion to dismiss the complaint upon the grounds already stated, which are to the effect that so far as moneys that were paid out on these checks are concerned, there is no evidence of any insolvency of the bank.

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Furthermore, that the moneys were public moneys within the intention and within the wording of Section 90 of the National Banking Law and that they were legally secured, and that any payment out of this account was secured in any manner and particularly in the manner covered by the testimony in this case showing a legal and valid transaction binding upon the bank, the Conservators and Receivers.

On the further ground that there has been no demand made against anyone for the return of any of this money and there has been no service of any claim upon the officers

of the City, as required by the laws of the State of New York.

It seems to me that viewing the whole circumstances in this case it would be iniquitous to claim or hold that these trustees who have acted within the law and who have received these moneys and deposited them in the national bank and being fully secured as to all their deposits, having no profit whatever in this situation, acting merely as trustees and having in good faith drawn these checks and these checks having all been paid out by the bank without question, that now six years later we should be haled into court 248
and told that these trustees are personally liable and must refund these moneys; it seems to me that the whole course of conduct of the trustees and the bank and the representatives of the bank would make such an act very inequitable. So far as I can see, it is absolutely legal.

The cases hold that the State of New York, and it is the practice of the state banks and other institutions or depositories to give securities for public money, and I believe that the interpretation of Section 90 by the United States Supreme Court in the case just mentioned, McNair, Receiver, *v.* W. D. Knott, Treasurer, decided December 13, 1937 and not yet made public and published in the law 249
books, covers this whole situation very clearly.

In that case the Supreme Court determined that in a case where there might be any question of competition for the deposit of public moneys between national banks and state banks, that the national banks could cover the course of procedure and take the same steps that state banks might take or that might affect state banks.

In the case cited of the City of Mount Vernon *v.* The Mount Vernon Trust Company, decided by the Court of Appeals of this state, I think a careful examination of that opinion would show that the Court said that the City of Mount Vernon having received such securities for its

municipal deposits of about $1,000,000 from the Mount Vernon Trust Company, that they might not be entitled to hold and hypothecate those securities and they could not secure them back without repaying to the City the amount of the deposit.

It is the same situation that might be urged in this case. In other words, the City had the securities and the bank paid through the medium of these checks, I think no payments were ever made directly to the City, through the medium of these checks to those persons who presented
251 the checks and received their money, the bank paying up to the amount of the City's deposits and received back its collateral, and it is apparent from this record that there were particular City funds or City deposits which were covered by the same collateral. But it is apparent that the same procedure went through without question and the bank paid these checks and got their collateral back, and that is what the Court of Appeals says they would have to do in this State. I believe that the United States decisions from its Supreme Court and the one I last cited would bear out the fact that under such conditions the First National Bank and Trust Company had that power to make this deposit of securities and were within their legal
252 rights in getting them back and paying the City the amount of the City deposits. I think it is shown in this case that there was $535,000 worth of par value of securities held by the bank and they were returned to the City on the payment to the City of a far lesser amount than those securities represented.

In other words, it was an excellent thing for the bank itself to get back those pledged securities and to pay a much lesser sum than represented the City's account. All of this indicates that the bank acted voluntarily. No question about that. The transaction was consummated and here six years after this suit is brought.

As I say, it becomes a question of fact as to whether or not those were public funds or of such a nature as to be considered as public funds and, secondly, as to whether there was any undue payment received by reason of insolvency or by reason of any other claim as to why these moneys should be refunded. In that case of McNair *v.* Knott, Judge McReynolds in determining the case with a concurring opinion written by Mr. Justice Black, in his concurring opinion Judge McReynolds viewed the case like this where there had been this relationship between the parties and the matters had been consummated and 254
gone through with, he said that it seemed to him that there was nothing to decide the case on without going into the question of power under Section 90.

I ask your Honor if you will read that case. Your Honor is inclined to reserve decision on this motion until we can submit those authorities. Perhaps it might help us if your Honor could give us that opportunity.

Mr. Moore: There was a question raised about the giving of notice this morning. You will notice that this action is not brought against the City of Yonkers. It is brought against the Trustees of the Firemen's Pension Fund of the City of Yonkers. There is no notice required, 255
requiring us to give the City of Yonkers notice. No notice, I think, was given. I am not familiar with McNair *v.* Knott. I understand it is a recent case. The facts of it have never been brought to my attention. Mr. McAneny says it is not reported.

Mr. McAneny: It is reported, but not published in the printed volume.

The Court: The New York Court of Appeals?

Mr. McAneny: No, the Supreme Court.

The Court: Yes, the Supreme Court.

Mr. Moore: I thought that we were going to submit briefs in this case, your Honor.

256 *Motion to Dismiss the Complaint.*

The Court: That is the way to do it, of course.

Mr. Moore: How long a time will you want?

The Court: What about the other suits?

Mr. Moore: I am prepared to go ahead with the next case.

The Court: We will determine that question later. I will reserve decision on this motion. We will see how far we can get, to save all the time we can.

Mr. Moore: May we have a ten-minute adjournment so as to get the papers in the next case ready?

257 The Court: Yes.

Mr. McAneny: I ask the Court to make a finding in favor of the defendants.

The Court: I will withhold any action on this motion at this time.

Suppose you submit briefs on February 7th. You may send them to me at Buffalo at the Federal Courthouse.

Mr. McAneny: I assume that we will file separate briefs without the exchange of briefs and reply briefs.

Mr. Moore: Yes.

258

259

Plaintiff's Exhibit 1.

TREASURY DEPARTMENT

No. 653

Office of the Comptroller of the Currency

Washington, D. C., November 15, 1937.

WHEREAS, Arthur E. Muth was duly appointed and commissioned Receiver of "The First National Bank & Trust Company of Yonkers," located in the City of Yonkers, County of Westchester and State of New York on the twenty-third day of January, 1934, and whereas the said Arthur E. Muth has resigned to take effect at the close of business on November 15, 1937.

260

NOW, THEREFORE, I, William Prentiss, Jr., Acting Comptroller of the Currency, do hereby appoint Walter F. Downey Receiver of "The First National Bank & Trust Company of Yonkers" to take effect at the close of business on the fifteenth day of November, 1937, in place of the said Arthur E. Muth, with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

261

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fifteenth day of November, A. D., 1937.

WILLIAM PRENTISS, JR.,
Acting Comptroller of the Currency.

(Seal)

(Duly certified November 16, 1937.)

262

Plaintiff's Exhibit 2.

PROCLAMATION

(SEAL OF STATE)

STATE OF NEW YORK

Executive Chamber

Until early this morning it was my hope that it would not be necessary to interrupt the continuous operation of the banking system of New York State. The spread of
263 hysteria and the restrictions imposed upon the banking facilities of the country through measures adopted in so many states have at last placed upon the New York banks a burden so great that it has finally rendered drastic action imperative here.

Therefore, at a meeting early this morning the Clearing House Committee of the New York Clearing House, with the advice and recommendation of the Federal Reserve Bank of New York, has asked me to proclaim a banking holiday lasting until the close of business, Monday, March 6th.

I make this proclamation with complete conviction that
264 the best interests of the people of the State are being served thereby. This is a time for coolness and leadership. The people of this State and of the whole nation have shown a splendid spirit to date in meeting all the trying problems of the depression. I am confident that this spirit will be maintained.

The interval which this holiday affords should give responsible officials the necessary opportunity to consider the situation calmly and to prepare the way for an adjustment of our difficulties.

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby proclaim and set apart

Saturday, March 4th, and Monday, March 6th, as holidays on which all banking institutions will be closed.

GIVEN under my hand and the Privy Seal of the State at my residence, 820 Park Avenue, in the City of New York, this fourth day of March in the year of our Lord One Thousand nine hundred and thirty-three.

(SEAL)

HERBERT H. LEHMAN

BY THE GOVERNOR: 266

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 4—1933

EDWARD J. FLYNN
Secretary of State.

267

268

Plaintiff's Exhibit 3.

PROCLAMATION

(SEAL OF STATE)

STATE OF NEW YORK

Executive Chamber

WHEREAS, a proclamation has been issued by the President of the United States declaring a bank holiday to and including March ninth, one thousand nine hundred thirty-

269 three;

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby declare that the bank holiday heretofore declared by me in the State of New York is extended to and including said March ninth, one thousand nine hundred thirty-three.

(SEAL)

GIVEN under my hand at 820 Park Avenue in the City of New York and under the Privy Seal of the State at the Capitol in the City of Albany this sixth day of March in the year of our Lord one thousand nine hundred thirty-three.

270

HERBERT H. LEHMAN

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor.

State of New York
Department of State
Filed Mar 11—1933

EDWARD J. FLYNN
Secretary of State

Plaintiff's Exhibit 4.

FIRST NATIONAL BANK AND TRUST COMPANY

YONKERS, N. Y.

Name Firemen's Pension Fund City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
16,738.96	Mar 3 '33	50.00—	50.00—	48.21—			Mar 3 '33	16,590.75*—
16,590.75	Mar 18 '33	50.00—					Mar 18 '33	16,540.75*—
16,540.75	Mar 20 '31	50.00—					Mar 18 '33	16,490.75*—
16,490.75		50.00—					Mar 20 '33	16,440.75*—
16,440.75	Mar 28 '31	37.50—					Mar 28 '33	16,403.25*—
16,403.25	Mar 31 '33	125.00—	95.83—				Mar 31 '33	16,182.42*—
16,182.42	Apr 1 '33	104.17—	93.75—	50.00—				
	Apr 1 '33	166.67—	166.67—	50.00—				
	Apr 1 '33	125.00—	50.00—	50.00—				
	Apr 1 '33	50.00—	50.00—	116.67—				
	Apr 1 '33	104.17—	50.00—	141.67—				
	Apr 1 '33	83.87—	50.00—	50.00—				
	Apr 1 '33	50.00—	50.00—	166.67—				
	Apr 1 '33	166.67—	50.00—	125.00—				
	Apr 1 '33	95.83—	102.08—				Apr 1 '33	13,823.53*—
	Apr 3 '33	125.00—	50.00—	50.00—				
	Jan 3 '33	102.08—	50.00—	50.00—				
13,823.53	Jan 3 '33	50.00—	93.75—	50.00—				
	Jan 3 '33	116.67—	50.00—	87.50—				
	Jan 3 '33	166.67—	50.00—	50.00—				
26,505.39	Apr 3 '33	50.00—	270.83—					
	Apr 3 '33	50.00—	125.00—	50.00—				
	Apr 3 '33	187.50—	50.00—					
11,898.53							Apr 3 '33	11,898.53*—
11,898.53	Apr 4 '33	50.00—	166.67—	87.50—			Apr 4 '33	11,594.36*—
11,594.36	Apr 5 '33	50.00—	93.75—	50.00—				
	Apr 5 '33	50.00—	50.00—	50.00—			Apr 5 '33	11,250.61*
11,250.61	Apr 6 '33	50.00—	50.00—	50.00—			Apr 6 '33	11,100.61*—
11,100.61	Apr 7 '33	102.08—	95.83—				Apr 7 '33	10,902.70*
10,902.70	Apr 10 '33	102.08—					Apr 10 '33	10,800.62*
10,800.62	Apr 13 '33	95.83—					Apr 13 '33	10,704.79*
10,704.79	Apr 29 '33	104.17—					Apr 29 '33	10,600.62*—
10,600.62	May 1 '33	87.50—	50.00—	50.00—				
	May 1 '33	50.00—	50.00—	125.00—				
	May 1 '33	116.67—	50.00—	50.00—				
	May 1 '33	50.00—	125.00—	166.67—				
	May 1 '33	270.83—	104.17—	116.67—				
	May 1 '33	50.00—	166.67—	50.00—				
	May 1 '33	125.00—	141.67—	50.00—				
	May 1 '33	50.00—	102.08—	50.00—				
	May 1 '33	93.75—					May 1 '33	8,258.94*—
8,258.94	May 2 '33	50.00—	50.00—	87.50—				
	May 2 '33	187.50—	50.00—	166.67—				
	May 2 '33	166.67—	50.00—	50.00—				
	May 2 '33	50.00—	93.75—				May 2 '33	7,256.85*—
7,256.85	May 3 '33	5,636.02—	166.67—	50.00—				
	May 3 '33	50.00—	166.67—	50.00—				
	May 3 '33	50.00—	50.00—				May 3 '33	1,037.49*—
1,037.49	May 4 '33	125.00—	102.08—	95.83—				
	May 4 '33	93.75—	125.00—	50.00—				
	May 4 '33	50.00—	50.00—				May 4 '33	345.83*—
345.83	May 6 '33	50.00—	50.00—	95.83—			May 6 '33	150.00*—
150.00	May 8 '33	50.00—					May 8 '33	100.00*—
100.00	May 9 '33	50.00—					May 9 '33	50.00*—
50.00	Oct 26 '33	50.00—					Oct 26 '33	.00*—

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Plaintiff's Exhibit 5.

List of Bonds Surrendered

Description of Assets Pledged	Face Value
State of Arkansas, 4½s, due 1942	$ 50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
275 Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, due 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
276 City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00

Plaintiff's Exhibit 5.

Description of Assets Pledged	Face Value
City and County of San Francisco, 5s, due 1945	$ 10,000.00
Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, due 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
Laclede Gas Light Co., 5½, due 1935	5,000.00
Total Face Value	$535,000.00

Defendants' Exhibit A.

(Not printed.)

280

Defendants' Exhibit B.

(Front)

CITY OF YONKERS, N. Y.

Warrant No. 170736 No. 64269

Yonkers, N. Y. Feb. 28, 1933

50-53 WESTCHESTER TRUST COMPANY

Pay to the
order of FIREMEN'S PENSION FUND—YONKERS.....$15,570.06
City of Yonkers $15570 and 06 Cts.....Dollars

This check is payable through any member of the New York Clearing House without charge for exchange.

281 for F. P. Fund

Countersigned by

JAS. E. HUSHION
Comptroller

G. W. KLEIN JR.
Treasurer

CITY TREASURER'S OFFICE

(Back)

[Perforation]

PAID
3 1 33

282

[Stamps]

Pay to the Order of
Any Bank, Banker or Trust Co.
Previous Endorsements Guaranteed

[FEB 28 33]

THE FIRST NATIONAL BANK & TRUST CO.
50-51 Yonkers, N. Y. 50-51
William J. Bright, Cashier.

Pay to the Order of
FIRST NATIONAL BANK
Account of
Firemen's Pension Fund
City of Yonkers

Defendants' Exhibit C.

March 28, 1933

Received from the Treasurer of the City of Yonkers the following bonds:

15,000.	County of Jefferson 5s, 1947	11,250.
10,000.	State of Louisiana 4¾s—1973	7,500.
5,000.	" " 4½s—1953	4,000.
25,000.	City of Orlando, Fla. 5½s—1952	12,000.
25,000.	Canadian International Paper 6s—1949	5,250.
25,000.	Teaneck, N. J. 5½s—1934	17,500.
30,000.	Ohio Public Service 1953	24,000.
10,000.	South Bay Consolidated Water Co. 5s —1950	6,000.
5,000.	Laclede Gas Light Co. 5½s—35	2,400.
5,000.	New Orleans 4½s—1956	4,250.
15,000.	Butte, Montana 6s—41	11,250.
10,000.	Portsmouth, Va. 5s—54	7,700.
7,000.	Town of Huntington, L. I. 4½s—1946	5,915.
10,000.	Norfolk, Va. 4½s—1935	9,400.
197,000.		128,415.

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

286 *Defendants' Exhibit C.*

April 3rd, 1933

Received from the Treasurer of the City of Yonkers the following Bonds:

$50,000.	State of Arkansas	4½	1942	37	$ 18,500.
55,000.	Town of Lyndhurst	5½		60	33,000.
50,000.	Commonwealth of Kentucky	4½		80	40,000.
14,000.	Winston-Salem, N. C.	4¾		90	12,600.
15,000.	State of South Dakota	5		89½	13,425.
3,000.	Bay City	4		80	2,400.
287 5,000.	Town of Greenburgh	4½	1953	81.5	4,075.
1,000.	" " "	4½	1954	18¼	812.50
					$124,812.50

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
288 Yonkers, N. Y.

Defendants' Exhibit C. 289

April 7, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$15,000.	Norfolk, Va. 4½s—1935	@	94	14,100.
25,000.	Union, N. J. 6s—1934	@	80	20,000.
40,000.				34,100.

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects 290
without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

291

292 *Defendants' Exhibit C.*

May 4, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

5,000. City of Charlotte, N. C. 4½s due 1934
12,000. Galveston, Texas 5s—1933-5
15,000. Town of Greenburgh, N. Y. 4½s—1946
2,000. Town of Huntington, L. I. 4½s—1938
2,000. " " " 4½s—1945
10,000. City of New York 4½s— 1965
293 2,500. State of Oregon 5½s—1938
2,500. " " 5½s—1945
2,500. " " 5½s—1945
2,500. " " 5½s—1946
1,000. Village of Sea Cliff, N. Y. 5s—1933
25,000. State of New Mexico 6s—1935
6,000. Seattle, Wash., 5s—1934
2,000. " " 5s—1940

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

294 PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

Defendants' Exhibit C. 295

May 16, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$10,000. City & County of San Francisco, school bonds 5s of 1945

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers,

PERCIVAL TRUDEAU

296

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

Yonkers, N. Y., July 20, 1933

RECEIVED, from the Treasurer of the City of Yonkers the following bonds:

$2,000 Oregon State Highway 5½% bonds due Oct. 1, 1937; Nos. 5034 and 5035 $1,000 each

1,000 Oregon State Highway 5½% bonds due Oct. 1, 1938; 297
No. 5110 and

1,000 Oregon State Highway 5½% Bonds due April 1938; No. 5072

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

298

Defendants' Exhibit C-1.

Resolution of Board of Estimate and Apportionment of The City of Yonkers, Adopted July 10, 1929.

By Mr. Davis:

Resolved, That the First National Bank, Yonkers National Bank and Trust Company, Yonkers Trust Company, Westchester Trust Company, the Bryn-Mawr-Nepperhan National Bank and the Central National Bank be designated as banks and trust companies for the purpose of depositing all moneys of the city received by the
299 City Treasurer of the City of Yonkers; and the City Treasurer is hereby directed to continue to procure adequate security for all moneys deposited by him in any or all of the depositories hereinbefore designated, securing and protecting the City of Yonkers against any loss of the moneys so deposited. The action of the City Treasurer in procuring interest upon the following moneys in the following accounts is hereby approved: On average daily balance of accounts known as General Accounts, two per cent (2%) to be paid semi-annually on the 30th day of June and the 31st day of December; Firemen's Pension Fund, three and one-half per cent (3½%); Police Pension Fund, three and
300 one-half per cent (3½%); Saunders Trade Fund, three per cent (3%). The interest on the last mentioned accounts to be paid semi-annually on the 30th day of June and the 31st day of December in each year.

Adopted by the following vote:

Ayes—Mayor Fogarty, Council President Davis, Comptroller Loehr, Corporation Counsel Laragh and City Engineer Sheridan.

(Certified February 20, 1936.)

301

Defendants' Exhibit D.

(FRONT)

THE CITY OF YONKERS, N. Y.

Department of Finance Bureau of Comptroller

To Firemen's Pension Fund Dr.

Items	Amount
Firemen's Pension Fund, for year ended December 31, 1932	
Members' Contributions $10,380.04	302
City's Contributions (Local Law No. 2 (1931) Section 2) one and one-half (1½) times $10,380.04	$15,570.06
5,190.02	

TO THE COMPTROLLER:

I HEREBY CERTIFY, That the merchandise, materials or articles enumerated in the above account have been received and the services specified performed; that the prices are reasonable and just; that they were necessary for, and have been, or will be, applied to the uses of this Department, *and I further certify that no part of said account amounting in the aggregate to $15,570.06 has been paid or satisfied and that said amount be charged to the appropriate account as indicated on the opposite side of this claim.* 303

Yonkers, 1/4/33

Signed R. E. MARCHAND
Title of Office DEPUTY COMPTROLLER

Defendants' Exhibit D.

(BACK)

Warrant No. 170736

Claim No. 32308 Amount, $15,570.06

CLAIMANT

Firemen's Pension Fund,

Address Yonkers, N. Y.

Account	Amount
Firemen's Pension Fund	$15,570.06
1932	
Current Account	
Total	$15,570.06

Received for audit Jan 5 1933
Approved for payment 1/10/1933
Date of payment Feb 27 1933

MOREY
Auditor.

R. E. MARCHAND
Deputy Comptroller.

307

Findings of Fact.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

308

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188

This cause having duly come on to be tried by the Court without a Jury, and the allegations and proofs of the parties having been fully heard, I find and decide as follows: 309

1. The defendants constitute the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers and have the care, control and management of the fund.

2. On March 4, 1933 the defendants had on deposit in The First National Bank and Trust Company of Yonkers in a checking account captioned "Firemen's Pension Fund City of Yonkers" the sum of $16,590.75. The bank has since September 30, 1929 been a national banking corporation organized and existing under the laws of the United

310 *Findings of Fact.*

States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

3. The sources of the Firemen's Pension Fund as fixed by statute and local law, are rewards, gifts, fines, salary deductions and contributions from the City of Yonkers.

4. The purposes of the fund are to pay pensions to retired department members or their next of kin and to pay premiums on group life insurance policies covering the lives of department members.

311 5. On March 4, 1933 the Governor of the State of New York proclaimed a bank holiday and the bank did not open for business that day and never afterwards reopened for regular business.

6. On March 6, 1933 the President of the United States proclaimed a bank holiday and on March 9, 1933 the bank holiday was extended by further proclamation of the President.

7. The Comptroller of the Currency, pursuant to statute, appointed a Conservator of the Bank on March 20, 1933 and appointed a successor Conservator on July 24,
312 1933. On January 23, 1934 a Receiver was appointed to liquidate the Bank and the paintiff was appointed successor to such Receiver on November 15, 1937.

8. On July 10, 1929 the Board of Estimate and Apportionment of the City of Yonkers, consisting of the Mayor, the Common Council President, the Comptroller, the Corporation Counsel and the City Engineer, passed a resolution designating five several banks as depositories "for all moneys of the City received by the City Treasurer" and directing the City Treasurer to "continue to procure adequate security for all moneys deposited by him" in the designated depositories.

9. On September 30, 1929 three of the depositories referred to in the resolution were merged under the name The First National Bank and Trust Company of Yonkers.

10. On March 4, 1933 the Bank had on deposit with the City as security for the aforesaid account and for city deposits bonds having a par value of $535,000.

11. The balance of $16,590.75 in the account on March 4, 1933 was paid out in various amounts between March 18, 1933 and October 26, 1933.

12. Between March 29, 1933 and July 20, 1933 the City 314
returned to the Bank the pledged securities to the amount of $534,000 and retained bonds of the par value of $1,000.

13. The Conservator gave receipts for the returned bonds reciting therein "said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers."

14. A first dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

315

15. No statute of the state of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

16. No statute of the state of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

17. No applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure deposits of the City of Yonkers.

316 *Findings of Fact.*

18. Under the common law of the State of New York, as declared by its highest court, state banks lack the power to pledge assets to secure deposits of political subdivisions of the state.

19. That the pledge of assets by the Bank to secure the deposits in the account of the Firemen's Pension Fund City of Yonkers was illegal and *ultra vires.*

20. That the Bank was insolvent as of the 6th day of March, 1933 and that the rights of the general creditors of
317 the Bank became fixed as of March 6, 1933.

21. That the payments to the defendants from the deposit account Firemen's Pension Fund City of Yonkers were made with the view to the preference of the defendants over other creditors of the Bank.

22. That no service of any notice of claim or of intention to sue by the Bank through its Receiver was required.

23. That the payments from the Firemen's Pension Fund City of Yonkers deposit account to the defendants were voluntarily made under a mistake of law but are nevertheless recoverable.

318 24. Plaintiff is entitled to recover the sum of $8,295.38, being the difference between the amount which the defendants should have received under the 50% dividend paid by the Bank and the sum of $16,590.75 paid to the defendants, together with interest and the costs of this action.

25. The plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $9,954.45 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $8,295.38 from November 3, 1937 to the date of the judgment to be entered herein.

Dated, July 18, 1938.

JOHN KNIGHT,
District Judge.

319

Defendants' Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

320

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

Come now the above named defendants by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, their attorney, and considering the same to be material to the proper presentation of this case, respectfully request the Court to make and enter the following findings of fact and conclusions of law. 321

FINDINGS OF FACT.

1. That The First National Bank and Trust Company of Yonkers was and is for all purposes of this action a National Banking Institution organized and existing under, and by virtue of the laws of the United States of America,

322 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

having its only place of business in the City of Yonkers, State of New York.

2. That the City of Yonkers was and still is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

3. That the defendants, Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey are the Mayor, Comptroller and Commissioner of Public Safety of the City of Yonkers, New York, respectively, and since the 1st day of
323 January, 1932, have constituted the Board of Trustees of the Firemen's Pension Fund of said City of Yonkers, having the care, control and management of said fund.

4. That previous laws of the State of New York and of the City of Yonkers in relation to the Firemen's Pension Fund of the City of Yonkers were superseded and amended by Local Law number 2-1931 of the City of Yonkers, which provides as follows:

"CITY OF YONKERS

LOCAL LAW No. 2—(1931)

324 A LOCAL LAW OF THE CITY OF YONKERS TO AMEND AND SUPERSEDE ARTICLE XII, FIREMEN'S PENSION FUND OF THE SUPPLEMENTAL CHARTER OF SAID CITY, CONTAINED IN CHAPTER 452 OF THE LAWS OF 1908, AS AMENDED, ENTITLED "AN ACT TO SUPPLEMENT THE GENERAL LAWS RELATING TO THE GOVERNMENT OF THE CITY OF YONKERS, AND TO REVISE AND CONSOLIDATE THE LOCAL LAWS RELATING THERETO."

Be it enacted by the Common Council of the City of Yonkers, as follows:

Section 1. Article XII, Firemen's Pension Fund of the Supplemental Charter of the City of Yonkers,

N. Y., being part of Chapter 452 of the Laws of 1908 as amended entitled "An act to supplement the general laws relating to the government of the City of Yonkers, and to revise and consolidate the local laws relating thereto, is hereby amended and superseded to read as follows;

Section 1. The Mayor, the Comptroller and the Commissioner of Public Safety and their successors in office, shall constitute a board of trustees of the Firemen's Pension Fund; and they shall have the care, control, management and distribution of said funds as provided by law. The Comptroller shall be the custodian of the said fund, and the City Treasurer shall be the treasurer thereof. All orders made payable from the said fund shall be made upon the vote of said trustees, and such orders must be signed by the Commissioner of Public Safety, and countersigned by the Comptroller and by the City Treasurer. The trustees of the said fund shall invest for the benefit of the fund all moneys not necessary for the payment of pension, as hereinafter provided. Such investment shall be made only in securities in which the savings banks of the State of New York are authorized by law to invest. In addition to and as part of the pensions hereinafter specified, the said trustees are directed to cause group life insurance policies in sum of One Thousand Dollars per member to be issued upon the life of such member while employed in such service and until retirement therefrom and to pay out of said fund the premiums due thereon, provided the beneficiary named in said policies shall be limited to the widow, minor children under 18 years of age, or next of kin, of such member. The trustees of the said fund shall report in

detail to the Common Council annually in the month of January, the condition and the disposition of the fund, and the items of receipts and disbursements for account of the same during the year ending on the thirty-first day of the December preceding, including insurance policies then outstanding.

Section 2. The firemen's pension fund as it now exists is continued; and in addition to the moneys and investments therein contained it shall consist of:

1. All fines imposed by the Commissioner of Public Safety on the members of the Fire Department in the City of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the Fire Department, for account of fire service, except such payments or gifts as have been or shall be allowed by the Commissioner of Public Safety to be retained by the members receiving the same.

3. All money, pay, compensation or salary or any part thereof deducted or withheld from any member or members of the Fire Department, for or on account of absence or suspension from duty except in cases of sickness.

4. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members; which said sum shall be deducted monthly by the Comptroller of the City of Yonkers from the pay, salary

or compensation of each and every member of said Fire Department. And the Comptroller is hereby authorized, empowered and directed to deduct the said two per centum of the monthly pay, salary or compensation as aforesaid, and to cause the same to be paid forthwith to the trustees of the said Firemen's Pension Fund.

5. An amount payable to the trustees of the Firemen's Pension Fund out of the City treasury at the end of each fiscal year equivalent to one-and one-half times the amount of moneys deducted from the monthly pay, salary or compensation of each member of said Fire Department during such year, as provided by subdivision six of this section. Whenever, in any calendar year the disbursements from said fund shall exceed the total income thereof, and the principal sum of said fund is less than $250,000 there shall be included in the next annual budget and levy a sum to equal the amount of such deficiency for such previous year, and the same paid to the trustees of said fund. 332

Section 3. RETIREMENTS: The Commissioner of Public Safety shall have the power and authority to retire from all service in the Fire Department and relieve and dismiss from the said Department any member or officer of the Department who, upon an examination by the Fire Surgeon ordered by the said Commissioner, is found to be disqualified physically or mentally in the performance of his duties. 333

The Commissioner of Public Safety shall retire from all service in the Fire Department and relieve and dismiss from the said department, members or officers thereof in the following cases:

(a) Notwithstanding the provisions of Section 136, Second Class Cities Law, Chapter 55, Laws of 1909, as amended, the Commissioner of Public Safety is hereby directed to retire from all service in the Fire Department, any member or officer attaining the age of sixty-four years and it is the purpose of this provision to retire the said member by operation of law and not by the exercise of any discretion on the part of the Commissioner of Public Safety. The record of the Department of Public Safety as to the age of the various members and officers supplied to the said Department at the time of the appointment of the said member shall be controlling as to his age.

(b) Any member or officer of the Department, regardless of the age of the said member, who shall have served continuously as a member or officer of the Department for a period of twenty-five years at the time of his application for retirement, provided that such member or officer applies for retirement. Nothing in this section contained shall, however, be construed as a limitation on the powers otherwise conferred by law with respect to the removal or dismissal of members or officers of the Fire Department. No refunds for salary deductions shall be made to members dismissed from said force, or to any member who resigns before being entitled to a pension hereunder.

Section 4. The said board of trustees shall grant pensions out of said pension fund, in the following cases:

1. To any member or officer of the Fire Department who shall have been retired for disability and

who has been relieved and dismissed from the Fire Department and who has been placed on the pension roll, as provided in section three of this article, an annual pension payable monthly during his lifetime of a sum of money amounting to one-half of the full salary or compensation received by such member or officer at the date of his retirement from services; and said pension or allowance so allowed is to be in lieu of any salary which such member or officer was entitled to receive at the date of his being so 338
relieved or retired from duty and the City shall not be held liable for any payment of any claim or demand for service thereafter rendered by the member or officer of the force so retired.

2. To the widow of any member of the fire force who shall have been killed while in the actual performance of fire duty, or who shall have died from the effects of any injuries received in the actual discharge of such duty one half of the annual salary of such member at the time of death, payable to said widow during her lifetime, unless she remarries when said pension is to terminate.

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To the widow of any such member, who has died, or shall hereafter die after three months of service on said fire force, a sum not exceeding six hundred dollars per year, during widowhood. If there be no widow then the sum of $600.00 shall be paid to the child or children of such member until such child or children arrives at the age of eighteen years, when such pension is to terminate as to each child. If there be no widow or child or children under the said age of eighteen years, then said sum of $600.00 shall be paid to the next of kin of such deceased member, said sum to be paid thereafter to such next

of kin for one half the number of years of service to the credit of such deceased member.

To the widow of such member, who shall have been retired on a pension, or who shall hereafter be retired on a pension, a sum not exceeding six hundred dollars per year, during widowhood. If there be no widow then the said sum of $600.00 shall be paid to the child or children of such member until such child or children arrives at the age of eighteen years, when such pension is to terminate as to each child. If there be no widow or child or children under said age of eighteen years, then said sum of $600.00 shall be paid to dependent parent, for one half the number of years of service to the credit of such deceased member.

3. Pensions to widows shall terminate when the widow shall re-marry, and pensions to children shall terminate whenever the children shall respectively arrive at the age of eighteen years.

4. The said trustees are authorized to increase existing $300.00 pension to widows and children under eighteen years of age of deceased members to a sum not exceeding $600.00 to take effect from the time of granting such increase to such widow or children.

5. Every person who knowingly or wilfully in anywise procures the making or presentation of any false or fraudulent affidavit or affirmation concerning any claim for pension or payment thereof, shall be in every such case forfeit a sum not exceeding two hundred and fifty dollars to be sued and recovered by and in the name of said trustee of said Firemen's Fund and when recovered paid over to and become a part of said Firemen's Pension Fund.

6. For the purpose of this act the board of trustees of said Firemen's Pension Fund is hereby authorized to administer oaths and make acknowledgments; and any person who shall wilfully swear falsely in any oath or affirmation in obtaining or procuring any pension under the provisions of this act shall be guilty of perjury. The Comptroller is authorized to require sworn proof of beneficiary's identity before delivery of any pension check hereunder.

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7. Moneys, securities and effects of said Firemen's Pension Fund and all pensions granted and payable from said fund shall be and are hereby exempt from execution and from all process and proceedings to enjoin and recover the same by or on behalf of any creditor or pensioner having or assisting any claim against or debt or liability of any pensioner of said fund.

8. The members of said Fire Department whose salaries contribute to said pension fund shall annually select two of their members and the pensioners shall annually select one of their members; and the persons so selected shall constitute an auditing committee and shall audit the accounts and proceedings of the said trustees and make and file with the Clerk of the City of Yonkers a written report.

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Section 5. In case any part of this act is declared invalid the remaining part shall continue in full force and virtue.

Section 6. Article XXI, Firemen's Pension Fund incorporated in Supplemental Charter as part of Chapter 459, Laws of 1908, is hereby superseded.

Section 7. This Local Law shall take effect as prescribed by the City Home Rule Law.

Adopted by the Common Council at a stated meeting held November 10th, 1931, by a vote of ten to one.

JOHN S. DAVIS,
President of the Common Council.

Attest:
JOHN S. KETTELL,
City Clerk.

Approved November 23, 1931.
JOHN J. FOGARTY,
Mayor."

5. That by a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929, certain banks were designated as depositaries for all moneys of the City deposited by the City Treasurer and the City Treasurer was directed to "continue to procure adequate security for all moneys deposited by him" in the designated depositaries.

6. That on March 4, 1933, The First National Bank and Trust Company of Yonkers, the successor by merger to three of the depositaries designated in the resolution of the Board of Estimate and Apportionment of Yonkers of July 10, 1929, had on pledge with the City of Yonkers, bonds of the par value of $535,000 which had been procured by the City Treasurer of the City of Yonkers pursuant to said resolution of July 10, 1929, from time to time prior thereto to secure, among other deposits, deposits of the defendants made by said City Treasurer in an account, to wit: Firemen's Pension Fund, City of Yonkers, in the sum of $16,590.75.

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7. That on March 4, 1933, the defendants had on deposit in The First National Bank and Trust Company of Yonkers in the account "Firemen's Pension Fund, City of Yonkers," $16,590.75.

8. That the moneys on deposit in the First National Bank and Trust Company of Yonkers, in the account, "Firemen's Pension Fund, City of Yonkers," in the sum of $16,590.75 were public funds.

9. That on Saturday, March 4, 1933, the Governor of the State of New York issued a Proclamation declaring a banking holiday. 350

10. That the Governor's Proclamation of March 4, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

11. That The First National Bank and Trust Company was solvent on March 4, 1933.

12. That on Monday, March 6, 1933, the President of the United States issued a Proclamation declaring a banking holiday until March 9, 1933.

13. That the President's Proclamation of March 6, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent. 351

14. That The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

15. That on March 9, 1933, the President of the United States issued a Proclamation continuing the Proclamation of March 5, 1933, until further proclamation by the President.

16. That the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

352 17. That The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

18. That on March 20, 1933, pursuant to Bank Conservation Act of March 9, 1933, the Comptroller of the Currency appointed Percival W. Trudeau Conservator of The First National Bank and Trust Company of Yonkers.

19. That The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

353 20. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

21. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company was permitted to transact such business as any other bank was permitted to transact under the Presidential Proclamations of March 6, and 9, 1933.

22. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers had the right to make payments on account of pension checks
354 drawn against funds deposited prior to March 4, 1933.

23. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers paid out of the funds deposited prior to March 4, 1933, in the account "Firemen's Pension Fund, City of Yonkers" the sum of $150 upon pension checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

March 18, 1933	$100
March 20, 1933	50

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24. That on March 28, 1933, Percival W. Trudeau, in consideration (1) of the defendants' releasing their lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendants' not foreclosing their said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendants that he would pay out of the funds of the defendants remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out.

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25. That on March 28, 1933, The First National Bank and Trust Company of Yonkers by and with the consent of Percival W. Trudeau, Conservator, paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Firemen's Pension Fund, City of Yonkers" the sum of $37.50 upon pension checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers.

26. That on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendants, the City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendants' deposits, among others, of the par value of $197,000.

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27. That on July 24, 1933, Louis B. Rossire was appointed successor Conservator by the Comptroller of the Currency; that on January 23, 1934, the Comptroller of the Currency appointed Arthur E. Muth as Receiver of The First National Bank and Trust Company of Yonkers and

on November 15, 1937, the said Comptroller appointed Walter F. Downey, plaintiff herein successor Receiver.

28. That from March 28, 1933, to January 23, 1934, The First National Bank and Trust Company of Yonkers, by, and with the consent of Percival W. Trudeau, Conservator, and Louis B. Rossire, successor Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Firemen's Pension Fund, City of Yonkers," the sum of $16,403.25 upon pension
359 checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

March	31, 1933	$ 220.83
April	1, 1933	2,358.89
April	3, 1933	1,925.00
April	4, 1933	304.17
April	5, 1933	343.75
April	6, 1933	150.00
April	7, 1933	197.91
April	10, 1933	102.08
April	13, 1933	95.83
April	29, 1933	104.17
May	1, 1933	2,341.68
May	2, 1933	1,002.09
May	3, 1933	6,219.36
May	4, 1933	691.66
May	6, 1933	195.83
May	8, 1933	50.00
May	9, 1933	50.00
Oct.	26, 1933	50.00

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except that one check dated May 2, 1933, for $5,636.02 was not a pension check, but represented the balance in said account which was withdrawn and deposited in a new pension account in the Central National Bank of Yonkers.

29. That the moneys paid out of the account "Firemen's Pension Fund, City of Yonkers" by The First National Bank and Trust Company were payments made in the regular course of business in such bank.

30. That between March 29, 1933, and January 23, 1934, 362
pursuant to the said agreement between Percival W. Trudeau and the defendants, the City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendants' deposits of the par value of $337,000 on the dates and in the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

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leaving $1,000 of said bonds in the hands of the City of Yonkers.

31. That Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, gave receipts to the City of Yonkers for the securities upon their surrender, each of which receipts contained the following provision:

> "Said securities being released as pledged to secure deposits of the City of Yonkers, said release

364 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

being in all respects without prejudice to the City of Yonkers"

32. That on December 16, 1933, a first dividend of 40 per cent. and on November 3, 1937, a second dividend of 10 per cent. were made available to unsecured depositors of The First National Bank and Trust Company of Yonkers.

33. That the defendants were secured depositors to the extent of deposits in the account "Firemen's Pension Fund,
365 City of Yonkers," in the sum of $16,590.75.

34. That the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with the City of Yonkers as security for their deposits.

35. That no claim was ever filed with the City of Yonkers or any officer thereof for the claim alleged in the complaint herein.

36. That no notice of claim and no notice of intention to sue was ever filed with the City of Yonkers or any officer thereof with respect to the claim alleged in the complaint
366 herein.

37. That The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

38. That all of the moneys paid by The First National Bank and Trust Company of Yonkers out of the account "Firemen's Pension Fund, City of Yonkers", were paid while said bank was solvent.

39. That no demand was ever made upon the defendants, the City of Yonkers, or its officers or employees for the return of any of the money sued for herein.

Defendants' Requests for Findings of Fact and Conclusions of Law. 367

40. That the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

41. That the several acts found to have been done herein by the City of Yonkers were done on behalf of and as agent for the defendants.

CONCLUSIONS OF LAW.

1. That the defendants are entitled to judgment dismissing the complaint with costs. 368

2. That the City of Yonkers was and is a political subdivision of the State of New York, and was and is a city of the Second Class under Chapter 55 of the Laws of 1909 of New York, as amended.

3. That the funds deposited by the defendants in The First National Bank and Trust Company of Yonkers in account, "Firemen's Pension Fund, City of Yonkers", in the sum of $16,590.75 were public funds.

4. That the Proclamation of the Governor of New York of March 4, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent. 369

5. That the Proclamtion of the President of the United States of March 6, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

6. That the Proclamation of the President of the United States of March 9, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

370 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

7. That the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

8. That the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

371 9. That solvency is presumed until the contrary is proved.

10. That The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

11. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933.

12. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

372 13. That the plaintiff is not entitled to recover deposits of the defendants paid out by The First National Bank and Trust Company of Yonkers prior to its insolvency.

14. That the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

15. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to March 20, 1933.

Defendants' Requests for Findings of Fact and Conclusions of Law. 373

16. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to January 23, 1934.

17. That a conservator of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

18. That a conservator of a national bank appointed by the Comptroller of the Currency is not an officer of the Court. 374

19. That a receiver of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

20. That a receiver of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

21. That the negotiation of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same, was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank. 375

22. That the agreement of March 28, 1933 between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants was based upon a good and valid consideration.

23. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants constituted an accord and satisfaction.

376 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

24. That the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

25. That National Banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

26. That the validity, force and effect of the agreement
377 of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants is determined by the laws of New York, the place of making.

27. That the defendants were entitled to a preference in the payment of their funds upon liquidation of The First National Bank and Trust Company of Yonkers.

28. That under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

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29. That The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendants.

30. That The First National Bank and Trust Company of Yonkers' depositing assets with the City of Yonkers as security for the defendants' deposits of public funds was lawful.

31. That the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendants in the account,

"Firemen's Pension Fund, City of Yonkers", in the sum of $16,590.75, was lawful.

32. That the defendants were secured depositors of The First National Bank and Trust Company of Yonkers.

33. That if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with the City of Yonkers should serve as security for all of said City's deposits was beyond the powers of the said Bank, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of the 380
State of New York.

34. That in order to repossess itself of the assets, given to secure the deposits of the defendants, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the defendants.

35. That the payments of deposits between March 4, 1933, and March 20, 1933, to the defendants by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the 381
Secretary of the Treasury.

36. That the payments of deposits between March 20, 1933, and March 28, 1933, to the defendants by the Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

37. That the payments of deposits between March 28, 1933, and January 23, 1934, to the defendants by the Con-

servator and successor Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

38. That the defendants were creditors of The First National Bank and Trust Company of Yonkers.

383 39. That the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

40. That the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City of Yonkers as security for their deposits.

41. That this action was not commenced within the time limited by law.

42. That the defendants are prohibited by law from paying the claim alleged in the complaint.

384 43. That the City of Yonkers, its officers and boards are prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

44. That the City of Yonkers, its officers and boards are not liable in a civil action for damages or injuries to person or property, or invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or

because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be presented to the Common Council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

In the event of a denial by the Court of defendants' requests for the foregoing findings of fact and conclusions of law or any part thereof, defendants respectfully request the Court to grant an exception or exceptions to defendants.

Dated, Yonkers, N. Y., July , 1938.

Respectfully submitted,

LEONARD G. MCANENY,
Attorney for defendants.

388 **Rulings on Defendants' Requests for Findings of Fact and Conclusions of Law.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

389 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

390 Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y.; for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y.; and MORRIS L. ROSENWASSER and HAROLD T. GARRITY, of Counsel; for Defendant.

KNIGHT, District Judge:

The Court finds with respect to the Defendant's Findings of Fact and concludes as to the Conclusions of Law submitted in this case as follows:

Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law. 391

FINDINGS OF FACT.

1. Found.
2. Found.
3. Found.
4. Found, except as to section 3 *et seq.*
5. Found.
6. Found.
7. Found.
8. Refused.
9. Found. 392
10. Found.
11. Refused.
12. Found.
13. Refused.
14. Refused.
15. Found.
16. Refused.
17. Refused.
18. Found.
19. Refused.
20. Refused.
21. Refused. 393
22. Refused.
23. Found, except that request should show payment of March 20, 1933, as made by Conservator.
24. Refused.
25. Found.
26. Refused.
27. Found.
28. Found.
29. Refused.
30. Refused.
31. Found.

394 *Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law.*

32. Found.
33. Refused.
34. Refused.
35. Found.
36. Found.
37. Refused.
38. Refused.
39. Found.
40. Refused.
41. Refused.

395

CONCLUSIONS OF LAW.

1. Refused.
2. Found.
3. Refused.
4. Found.
5. Found.
6. Found.
7. Refused.
8. Refused.
9. Refused.

396

10. Refused.
11. Refused.
12. Refused.
13. Refused.
14. Refused.
15. Refused.
16. Refused.
17. Found.
18. Found.
19. Found.
20. Found.
21. Refused.

Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law. 397

22. Refused
23. Refused.
24. Refused.
25. Refused.
26. Refused.
27. Refused.
28. Refused.
29. Refused.
30. Refused.
31. Refused.
32. Refused. 398
33. Refused.
34. Refused.
35. Refused.
36. Refused.
37. Refused.
38. Found.
39. Refused.
40. Refused.
41. Refused.
42. Refused.
43. Refused.
44. Refused. 399

July 18, 1938.

JOHN KNIGHT,
United States District Judge.

Filed July 29, 1938.

400 **Defendants' Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

401 JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

Exceptions are allowed the defendants as noted in the
402 stenographic minutes of the trial herein, and to the findings numbered 5, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 contained in the findings of the Court, dated July 18, 1938, and to the denial of findings of fact numbered 4, 8, 11, 13, 14, 16, 17, 19, 20, 21, 22, 23, 24, 26, 29, 30, 33, 34, 37, 38, 40 and 41 and to the denial of conclusions of law numbered 1, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, and 44 as requested by the defendants, this 27th day of October, 1938.

JOHN KNIGHT,
U. S. D. J.

and the defendants pray that its bill of exceptions may be allowed, settled and signed.

LEONARD G. MCANENY,
Attorney for Defendants.

403

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the bill of exceptions herein contains all the material facts, proceedings, rulings and exceptions thereto occurring upon the trial of this cause and not heretofore a part of the record herein and that the exhibits set forth or referred to constitute all the exhibits offered in evidence at the said trial and that the same may be settled and allowed in the form proposed and submitted and ordered on file as a bill of exceptions herein.

Dated, Yonkers, New York, November 17, 1938. 404

BENJ. W. MOORE,
Attorney for Plaintiff,

LEONARD G. MCANENY,
Attorney for Defendants.

Order Settling Bill of Exceptions.

It appearing that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of this cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial; and that the exhibits set forth in the foregoing bill of exceptions constitute all of the exhibits offered in evidence in the said trial, 405

I hereby settle and allow the foregoing bill of exceptions as a full, true, and correct bill of exceptions in this cause and order the same on file, and further order the clerk of this Court to transmit said entire bill of exceptions to the Circuit Court of Appeals for the Second Circuit.

Dated this 18th day of November, 1938.

JOHN KNIGHT,
U. S. D. J.

406

Opinion of Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

407

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

Appearances:

408

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y., MORRIS L. ROSENWASSER; and HAROLD T. GARRITY, of Counsel for Defendants.

Hon. JOHN KNIGHT, District Judge:

This suit was tried together with the action of Walter F. Downey, Receiver *v.* City of Yonkers, decided herewith. The opinion in that action is applicable here. On March 4, 1933, the First National Bank and Trust Company of Yonkers had on its books deposit account captioned: "Fire-

men's Pension Fund, City of Yonkers." The balance of this account on March 4, 1933, was $16,590.75. This balance was paid out by the Conservator of the bank in various amounts between March 18, 1933, and October 26, 1933, inclusive. All the payments were on pension checks drawn to the pensioners of the Firemen's Pension Fund, except that $5,636.02 represented a balance in the account. These deposits were made pursuant to resolution adopted by the Board of Estimate and Apportionment on July 10, 1929. The bank pledged with the City certain bonds as security for these deposits. A distinction between the two cases is 410
claimed in respect to the nature of the deposit—whether public or private. In my view this makes no difference. It is not necessary to decide in which category this is to be listed. This question was discussed in the above mentioned opinion in connection with the Nepperhan Valley Sewer deposit. For the reasons assigned in Downey *v.* City of Yonkers, the pledge of these securities was *ultra vires,* and the deposits paid therefrom are recoverable by the Receiver.

Plaintiff is entitled to recover the sum of $8,295.38, being the difference between the amount which the city should have received under the fifty per cent. dividend paid by the bank and the sum of $16,590.75 paid to the city, together with interest from April, 1936. 411

Findings may be submitted to be signed and be made a part of the decision herein.

June 8, 1938.

JOHN KNIGHT,
United States District Judge.

412

Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

413

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

414 The issues in this action having been regularly brought on for trial before Hon. John Knight, District Judge, on the 4th day of January, 1938, without a Jury, and the plaintiff having appeared by Benjamin W. Moore, his attorney, and Milton L. Romm, of counsel, and the defendants having appeared by Leonard G. McAneny, Esq., Corporation Counsel, and Morris L. Rosenwasser, Esq. and Harold T. Garrity, Esq., Assistant Corporation Counsels, and the court having heard the allegations and proofs of the parties and having filed its opinion, dated June 8, 1938, and its findings of fact and conclusions of law, dated July 18, 1938, directing judgment as hereinafter stated, and the costs of the plaintiff having been duly taxed at $77.85

Opinion of Court as to Applicability of Rules of Civil Procedure. 415

Now, on motion of Benjamin W. Moore, attorney for the plaintiff, it is

ADJUDGED that the plaintiff, Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, do recover of the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, the sum of $8,295.38 together with interest thereon in the sum 416
of $1,277.98 and the sum of $77.85 costs as taxed, making in all the sum of $9,651.21 and that the plaintiff have execution therefor against the defendants Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers.

Judgment signed this 5th day of August, 1938.

CHARLES WEISER,
Clerk.

417

Opinion of Court as to Applicability of Rules of Civil Procedure.

The motion in each of these cases for an order limiting exceptions herein pursuant to new Rule 46 is denied. Irrespective of the question of whether new Rule 86 applies to actions in which final judgment had been entered prior to the effective date of the new rules, it is my view that the application of the new rules would not be feasible and work injustice to the defendant.

An order may be submitted to conform with this communication.

JOHN KNIGHT,
U. S. D. J.

418

Order Denying Motion to Apply New Rules on Appeal.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court House thereof in the Borough of Manhattan, City of New York, on the 18th day of October, 1938.

Present:

HON. JOHN KNIGHT,
District Judge.

419

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

420 L. 63-188.

The defendants having moved this Court for an order invoking the application of the Federal Rules of Civil Procedure to this action with respect to Rule 46 eliminating

Order Denying Motion to Apply New Rules on Appeal. 421

the necessity for exceptions and Rule 73 eliminating the necessity of assignments of error, and said motion having been submitted by Leonard G. McAneny, Esq., attorney for the defendants, and by Benjamin W. Moore, attorney for the plaintiff, by Milton L. Romm, of counsel.

Now, on reading and filing the notice of motion dated the 20th day of September, 1938 and the affidavit of Leonard G. McAneny, thereto annexed, verified the 20th day of September, 1938, in support of said motion, and the affidavit of Benjamin W. Moore, verified the 3rd day of October, 1938, in opposition thereto, it is 422

ORDERED, that the motion be and it hereby is in all respects denied.

JOHN KNIGHT,
District Judge.

423

424 **Petition and Order Allowing Appeal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

425 JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

To the Honorable William Bondy, Judge of the District
426 *Court, sitting for the Southern District of New York.*

Now come the defendants-appellants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, by Leonard G. McAneny, their attorney, and feeling themselves aggrieved by the judgment of this Court entered on the 5th day of August, 1938, hereby pray that an appeal may be allowed to them from said judgment, to the United States Circuit Court of Appeals for the Second Circuit, and that citation issue, and, in connection with this petition, petitioners herewith present their assignment of errors.

Petition and Order Allowing Appeal.

Petitioners further pray that an order be made fixing the amount of the bond to be given by defendants for costs, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, shall be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated: Yonkers, New York, October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel, Attorney for
Defendants-Appellants.

The above appeal is hereby allowed.

Dated: New York, N. Y., October 31st, 1938.

WM. BONDY,
U. S. D. J.

A bond for costs in the usual form was duly approved and filed in the office of the clerk of the Court on October 31, 1938.

430 **Assignments of Error and Prayer for Reversal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

431 JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

Now COME the defendants-appellants, Joseph F. Loehr,
432 Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, Constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, by Leonard G. McAneny, Corporation Counsel their attorney, and submit, present and file their assignments of error complained of and say:

That in the records and proceedings of the Honorable United States District Court for the Southern District of New York in a certain action entitled "Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, Plaintiff, against Joseph F.

Loehr, Mayor, James J. Hushion, Comptroller; and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, Defendants'', and in the determination of the issues raised, there is manifest error to the injury and prejudice of the said appellants, and for such error the appellants assign the following:

1. The said court erred in finding that The First National Bank and Trust Company of Yonkers did not open for business on March 4, 1933 and never afterwards reopened for regular business. 434

2. The said court erred in finding that no statute of the State of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

3. The said court erred in finding that no statute of the State of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

4. The said court erred in finding that no applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure deposits of the City of Yonkers. 435

5. The said court erred in finding that under the common law of the State of New York as declared by its highest court, state banks lacked the power to pledge assets to secure deposits of political subdivisions of the state.

6. The said court erred in finding that the pledge of assets by the bank to secure the deposits in the account of the Firemen's Pension Fund, City of Yonkers, was illegal and ultra vires.

436 *Assignments of Error and Prayer for Reversal.*

7. The said court erred in finding that the bank was insolvent as of the 6th day of March, 1933 and that the rights of general creditors of the bank became fixed as of March 6, 1933.

8. The said court erred in finding that the payments to the defendants from the deposit account Firemen's Pension Fund, City of Yonkers, were made with the view to the preference of the defendants over other creditors of the bank.

437 9. The said court erred in finding that no service of any notice of claim or of intention to sue by the bank through its Receiver was required.

10. The said court erred in finding that the payments from the Firemen's Pension Fund, City of Yonkers, deposit account to the defendants were voluntarily made under mistake of law, but are nevertheless recoverable.

11. The said court erred in finding that plaintiff is entitled to recover the sum of $8,295.38; being the difference between the amount which the defendants should have received under the 50% dividend paid by the bank and the sum of $16,590.75 paid to the defendants together with
438 interest and the costs of this action.

12. The said court erred in finding that the plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $9,954.45 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $8,295.38 from November 3, 1937 to the date of the judgment to be entered herein.

13. The said court erred in failing to find that Local Law number 2—1931 of the City of Yonkers, contained all of the provisions set forth in paragraph numbered "4" in defendants' Requests for Findings of Fact and Conclusions of Law.

14. The said court erred in failing to find that the monies on deposit in The First National Bank and Trust Company of Yonkers in the account "Firemen's Pension Fund, City of Yonkers" in the sum of $16,590.75 were public funds.

15. The said court erred in failing to find that The First National Bank and Trust Company was solvent on March 4, 1933.

16. The said court erred in failing to find that the President's Proclamation of March 6, 1933 did not declare 440
that The First National Bank and Trust Company of Yonkers was insolvent.

17. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

18. The said court erred in failing to find that the President's Proclamation of March 9, 1933 did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

19. The said court erred in failing to find that The First National Bank and Trust Company was solvent on March 441
9, 1933.

20. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

21. The said court erred in failing to find that from March 6, 1933 to March 20, 1933 The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

22. The said court erred in failing to find that from March 6, 1933 to March 20, 1933 The First National Bank

442 *Assignments of Error and Prayer for Reversal.*

and Trust Company was permitted to transact such business as any other bank was permitted to transact under the presidential proclamation of March 6, 1933.

23. The said court erred in failing to find that from March 6, 1933 to March 20, 1933 The First National Bank and Trust Company of Yonkers had the right to make payments on account of pension checks drawn against funds deposited prior to March 4, 1933.

24. The said court erred in failing to find that on March
443 28, 1933 Percival W. Trudeau, in consideration

(1) of the defendants' releasing their lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City

(2) of the defendants not foreclosing their said lien in the state courts

(3) of the city's surrendering the said assets so deposited,

agreed with the defendants that he would pay out the funds of the defendants remaining on deposit with The First National Bank and Trust Company, provided the city would
444 return the bonds deposited with the city as security as the funds were paid out.

25. The said court erred in failing to find that on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendants, The City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said city as security for defendants' deposits, among others, of the par value of $197,000.

26. The said court erred in failing to find that the monies paid out of the account "Firemen's Pension Fund, City of Yonkers", by The First National Bank and Trust Company were payments made in the regular course of business of such bank.

27. The said court erred in failing to find that between March 29, 1933 and January 23, 1934, pursuant to the said agreement between Percival W. Trudeau and the defendants, The City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery 446
to said Percival W. Trudeau, Conservator, bonds, held by the said city as security for defendant's deposits of the par value of $337,000 on the dates and in the amounts as follows:

April 3, 1933	$195,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of The City of Yonkers. 447

28. The said court erred in failing to find that the defendants were secured depositors to the extent of deposits in the account "Firemen's Pension Fund, City of Yonkers" in the sum of $16,590.75.

29. The said court erred in failing to find that the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company, deposited with The City of Yonkers as security for their deposits.

448 *Assignments of Error and Prayer for Reversal.*

30. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

31. The said court erred in failing to find that all of the monies paid by The First National Bank and Trust Company of Yonkers out of the account "Firemen's Pension Fund, City of Yonkers" were paid while said bank was solvent.

32. The said court erred in failing to find that the Treasurer of The City of Yonkers is and was a person 449 receiving and depositing moneys belonging to the State of New York.

33. The said court erred in failing to find that the several acts found to have been done by The City of Yonkers were done on behalf of and as agents for the defendants.

34. The said court erred in failing to make the conclusion of law that the defendants are entitled to judgment dismissing the complaint with costs.

35. The said court erred in failing to make the conclu- 450 sion of law that the funds deposited by the defendants in The First National Bank and Trust Company of Yonkers in the account "Firemen's Pension Fund, City of Yonkers" in the sum of $16,590.75 were public funds.

36. The said court erred in failing to make the conclusion of law that the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

37. The said court erred in failing to make the conclusion of law that the appointment of Louis D. Rossire as successor Conservator of The First National Bank and

Trust Company of Yonkers did not create a presumption that said bank was insolvent.

38. The said court erred in failing to make the conclusion of law that solvency is presumed until the contrary is proved.

39. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

40. The said court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933. 452

41. The said court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

42. The said court erred in failing to make the conclusion of law that the plaintiff is not entitled to recover deposits of the defendants paid out by The First National Bank and Trust Company of Yonkers, prior to its insolvency. 453

43. The said court erred in failing to make the conclusion of law that the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

44. The said court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to March 20, 1933.

454 *Assignments of Error and Prayer for Reversal.*

45. The said court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to January 23, 1934.

46. The said court erred in failing to make the conclusion of law that the negotiations of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same,
455 was within the scope of the authority of Percival W. Trudeau as Conservator of said bank.

47. The said court erred in failing to make the conclusion of law that the agreement of March 28, 1933 between Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers and the defendants was based upon a good and valid consideration.

48. The said court erred in failing to make the conclusion of law that the agreement of March 28, 1933 between Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers and the defendants
456 constituted an accord and satisfaction.

49. The said court erred in failing to make the conclusion of law that the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

50. The said court erred in failing to make the conclusion of law that national banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

51. The said court erred in failing to make the conclusion of law that the validity, force and effect of the agree-

ment of March 28, 1933 between Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers and the defendants is determined by the laws of New York, the place of making.

52. The said court erred in failing to make the conclusion of law that the defendants were entitled to a preference in the payment of their funds upon liquidation of The First National Bank and Trust Company of Yonkers.

53. The said court erred in failing to make the conclusion of law that under the law of the State of New York 458
state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

54. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendants.

55. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers' deposit of assets with The City of 459
Yonkers as security for the defendants' deposits of public funds was lawful.

56. The said court erred in failing to make the conclusion of law that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendants in the account "Firemen's Pension Fund, City of Yonkers" in the sum of $16,590.75 was lawful.

57. The said court erred in failing to make the conclusion of law that the defendants were secured depositors of The First National Bank and Trust Company of Yonkers.

58. The said court erred in failing to make the conclusion of law that if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with The City of Yonkers should serve as security for all of said city's deposits was beyond the powers of the said bank, the rights and obligations of the plaintiff and defendants arising therefrom are determined by the laws of the State of New York.

59. The said court erred in failing to make the conclusion of law that in order to repossess itself of the assets
461 given to secure the deposits of the defendants, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the defendants.

60. The said court erred in failing to make the conclusion of law that the payments of deposits between March 4, 1933 and March 20, 1933 to the defendants by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the Proclamation of the President of March 6, 1933, the executive order of March 10, 1937 and Regulation number 10 of the Secretary of the Treasury.
462

61. The said court erred in failing to make the conclusion of law that payments of deposits between March 20, 1933 and March 28, 1933 to the defendants by the Conservator of The First National Bank and Trust Company of Yonkers were permitted payments allowed under the authority of the Proclamation of the President of March 6, 1933, the executive order of March 10, 1933 and Regulation number 10 of the Secretary of the Treasury.

62. The said court erred in failing to make the conclusion of law that the payments of deposits between March 28, 1933 and January 23, 1934 to the defendants by the

Conservator and successor Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the Proclamation of the President of March 6, 1933, the executive order of March 10, 1933 and Regulation number 10 of the Secretary of the Treasury.

63. The said court erred in failing to make the conclusion of law that the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

64. The said court erred in failing to make the conclusion of law that the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with The City of Yonkers as security for their deposits. 464

65. The said court erred in failing to make the conclusion of law that this action was not commenced within the time limited by law.

66. The said court erred in failing to make the conclusion of law that the defendants are prohibited by law from paying the claim alleged in the complaint.

67. The said court erred in failing to make the conclusion of law that The City of Yonkers, its officers and boards are prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller and shall have been audited and allowed by him. 465

68. The said court erred in failing to make the conclusion of law that The City of Yonkers, its officers and boards, are not liable in a civil action for damages or

466 *Assignments of Error and Prayer for Reversal.*

injuries to person or property or invasion of personal or property rights of any name or nature whatsoever arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the city or any of its agents, officers or employees, unless a claim therefor, in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim
467 arose, be presented to the common council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such accident or injury or the occurrence of such act, omission, fault or neglect.

69. The said court erred in denying the defendant's motion to dismiss the complaint made at the end of the plaintiff's case.

70. The said court erred in striking out from the answer
468 of the defandants' witness, Stephen A. Roake, the following with respect to the deficit in the Firemen's Pension Fund for the year ending December 31st, 1933:

"A. (Continuing) December 31, 1932, the deficit was $6,790.66; $27,591.75 for 1933.

Q. What year was that? A. 1933.

Mr. Romm: What date in that year?

The Witness: December 31st.

Mr. Moore: I object. That fact was taken up by the payment, your Honor.

The Court: How is it material then, Mr. McAneny?

Mr. Moore: I move to strike out the answer, the last part of the answer, so far as it refers to the deficit in 1933.

Mr. McAneny: I am entitled to show what the City actually paid into this fund. We are now trying the case here to determine the character of this fund.

The Court: In so far as these deposits were a part of the fund in question I am receiving it. Beyond that I won't do it.

Mr. Moore: This last payment was not in our bank at all. It had nothing to do with the fund, so far as our bank was concerned. 470

The Court: How did that happen? Paid some other bank?

Mr. Moore: Paid into some other bank. Our bank closed on the 3rd of March, 1933 and they had received all their money from our bank by the 16th day of December, 1933. Now he has testified as to the deficit on December 31, 1933, which was two weeks after we paid them out. We paid them and closed up. What the deficit was in 1933——

The Court: I do not see that it is relevant here. 471

Mr. McAneny: I think it is important that you know the character of this fund. The First National Bank and Trust Company carried this as the City of Yonkers Firemen's Pension Fund. They were fully aware of the law. They could see the actual facts, how that fund has been handled by the officials of the City. It seems to me that has a bearing on the characterization of the fund.

The Court: I do not think so. I will sustain the objection.

Mr. McAneny: I take an exception."

472 *Assignments of Error and Prayer for Reversal.*

71. The said court erred in denying the defendants' motion to dismiss the complaint made at the conclusion of the whole case.

WHEREFORE, said defendants-appellants respectfully pray:

(1) That the judgment entered in said action be reversed.

(2) That judgment be entered in favor of the defendants with costs in all courts.

473

(3) That the lower court be directed to enter judgment in favor of the defendants with costs in all courts.

(4) That said defendants-appellants have such other, further or different relief as may be just.

Dated: October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel,
474 Attorney for Defendants-Appellants.

475

Citation.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

476

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

To Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, Appellee, and Benjamin W. Moore, his attorney, Greeting: 477

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit held at Federal Courthouse, in the Borough of Manhattan, City and State of New York, within thirty days from the date hereof, pursuant to an appeal filed in the office of the United States District Court, Southern District of New York, at New York, N. Y., wherein Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees

478 *Citation.*

of the Firemen's Pension Fund of the City of Yonkers are appellants and Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, in liquidation is appellee, to show cause, if any there be, why the judgment entered herein on the 5th day of August, 1938, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable William Bondy, Judge of the District Court of the United States, sitting for the Southern District of New York, on this 31st day of October, 1938.

479

WM. BONDY,
U. S. D. J.

480

Notice of Appeal.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

To Charles Weiser, Clerk of the United States District Court, Southern District of New York.

Sir:

Notice is hereby given that Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, defendants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on August 5, 1938.

Dated: New York, N. Y., October 31, 1938.

LEONARD G. MCANENY,
Corporation Counsel, Attorney for Defendants,
Office & P. O. Address,
City Hall,
Yonkers, New York.

484 **Stipulation and Order Extending Time to File Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

485 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

L. 63-188

486

WHEREAS, an appeal was allowed the defendants herein on the 31st day of October, 1938, and

WHEREAS, the time of the said defendants to docket this case and file the transcript of record on appeal herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit will expire on November 30, 1938, now therefore,

IT IS STIPULATED AND AGREED, by and between the parties hereto that the time of the defendants to docket this case

and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938 and an order to this effect may be entered by either party without notice.

Dated: Yonkers, New York, November 23, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

488

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants.

On reading and filing the foregoing stipulation, it is

ORDERED, that the time of the defendants to docket the above entitled case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938.

Dated: New York, N. Y., November 23, 1938.

489

CHARLES WEISER,
Clerk, U. S. District Court,
Southern District of New York

490 **Stipulation and Order Settling Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

491 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS H. MORRISSEY, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

L. 63-188

492 IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true copy of the transcript of the record of the District Court in the above entitled matter as agreed upon by the parties.

Dated: Yonkers, New York, November 29, 1938.

BENJ. W. MOORE
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants.

On reading the foregoing stipulation, it is

ORDERED, that the foregoing printed record be filed in lieu of the original appeal papers for the purpose of certifying a record on appeal.

Dated: New York, N. Y., December 3rd, 1938.

VINCENT L. LEIBELL.

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of the record of the said District Court in the above entitled matter.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York this 5th day of December, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundredth and sixty-third year.

CHARLES WEISER,
Clerk.

(Seal)

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Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

THE CITY OF YONKERS,

497 Defendant-Appellant.

No. 230.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

498 Defendants-Appellants.

No. 231.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants-Appellants.

No. 232.

499 5

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders of "The Saunders Trade School Fund",
Defendant-Appellant.

No. 233.

500 6

Before:

L. HAND, AUGUSTUS N. HAND and CHASE,
Circuit Judges.

Appeals from the United States District Court for the Southern District of New York.

From judgments in the several actions above-named that the Receiver of the First National Bank & Trust Company of Yonkers in Liquidation recover of the respective defendants therein fifty per cent. of certain moneys paid out by the Bank between March 8, 1933 and January 23, 501
1934, inclusive, on checks drawn on behalf of the various defendants, the latter appeal. Affirmed.

LEONARD G. MCANENY, Corporation Counsel, for Defendants-Appellants; LEONARD G. MCANENY, E. J. DIMOCK, MORRIS L. ROSENWASSER, J. DONALD RAWLINGS and HAROLD T. GARRITY, Counsel.

BENJAMIN W. MOORE, Attorney for Plaintiff-Appellee; BENJAMIN W. MOORE and MILTON L. ROMM, Counsel.

502 *Opinion.*

AUGUSTUS N. HAND, Circuit Judge:

The legal principles applicable to Action No. 230 against the City of Yonkers are determinative of the issues in the other three cases which need not, therefore, be separately discussed.

This is an action by the receiver of The First National Bank & Trust Company of Yonkers (herein called the Bank) against The City of Yonkers (herein called the
503 City) to recover fifty per cent. of certain money paid out by the Bank, between March 8, 1933, and January 23, 1934, inclusive, on the checks of the City. Since September 30, 1929, the Bank has been a national banking corporation organized and existing under the laws of the United States and the City a municipal corporation organized and existing by virtue of the laws of the State of New York.

On March 4, 1933 the City had funds on deposit in checking accounts in the Bank as follows:

(1) Treasurer of the City	$275,105.53
(2) City of Yonkers	1,502.84
504 (3) Nepperhan Sewer Fund of City of Yonkers	621.88

On March 4, 1933, the Governor of the State of New York proclaimed a bank holiday, and on March 6, 1933, the President of the United States proclaimed a bank holiday which was extended by further proclamation on March 9, 1933 and ratified by Congress on the latter date. The Bank never reopened for regular business after March 4, 1933 but operated under restrictions imposed by the Secretary of the Treasury until a Conservator was appointed. On March 20, 1933 the Comptroller of the Currency appointed a Conservator of the Bank and on Janu-

505 5

ary 23, 1934, appointed a receiver in liquidation. A dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

On March 4, 1933, the City held various bonds having a par value of $535,000 which had been delivered to it by the Bank as security for the above three accounts, among others. These bonds, to the amount at par of $534,000, were later returned in connection with withdrawals from the accounts.

By a series of withdrawals beginning on March 8, 1933 and ending on January 23, 1934, the City withdrew almost all of the balance in each of the three accounts as follows: 506 6

1. Account with Treasurer of City		$275,105.53
Withdrawals:		
March 8 to March 19	$ 89,226.06	
March 20 to March 27	67,735.99	
March 28 on	118,016.99	
Total		274,979.04
		507 7
2. Account with City of Yonkers		$ 1,502.84
Withdrawals:		
May 23 to July 21, 1933		1,502.84
3. Account with Sewer Fund		$ 621.88
Withdrawals:		
May 4, 1933		621.88

The complainant seeks to recover fifty per cent. of the above withdrawals on the ground that they constituted an unlawful preference within Sections 91 and 194, U. S. C. A., of the National Bank Act.

If the pledge of bonds to secure the deposits was authorized by the National Bank Act it is clear that the City had a valid lien on the bonds to the extent of its deposits and this action by the receiver must fail. *Lewis* v. *Fidelity Deposit,* 292 U. S. 559; *McNair* v. *Knott,* 302 U. S. 369. It is likewise settled that national banks have no implied power to pledge assets to secure either private or public deposits, *Texas & Pac.* v. *Pottorff,* 291 U. S. 245; *Marion* v. *Sneeden,* 291 U. S. 262. Express authority for the pledge made in this case depends upon whether the requirements of the Act of June 25, 1930, 12 U. S. C. A., §90, have been met. That section provides that:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The purpose of the Act of June 25, 1930 was to equalize the positions of national and state banks in competing for deposits, and is in line with a long series of acts, beginning in 1864, designed to apply the policy of equalization. *Lewis* v. *Fidelity Co.,* 292 U. S. 559, at 564-65.

It is conceded that there was no express statutory authority in New York authorizing state banks to give security for these deposits during the times involved. In the absence of express enabling statutes state banks in New York are not authorized to pledge assets to secure either private or public deposits, and it is the duty of the

511 5

Superintendent of Banks to compel them to recover any assets so pledged upon the return of the deposits when demanded. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, at 187-88. As was said by Judge Finch in his opinion in *City of Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, 406: "No question remains that this pledge by the defendant securing the deposit (of public money) was *ultra vires* as to both parties." So far as the Act of June 25, 1930 may be thought to require an authorization of state banks to make pledges as a prerequisite for pledges by national banks it does not apply here.

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But the law of New York is that pledges by state banks to secure deposits, even though *ultra vires*, may not be set aside until the deposits have been repaid in full, whether or not insolvency has intervened. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175; *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400. The parties concede that the law of New York with respect to the effect of an *ultra vires* pledge does not bring the pledges here within the Act of June 25, 1930. The policy of the statute would appear to lead to the same conclusion. The Act was designed to equalize competition for public deposits and it does not appear to give national banks authority to do what the state banks are forbidden to do and what the State Superintendent of Banks is under a duty to undo. The banks of the State could not give security in a case like this without violating their charters; Congress could not have intended to meet that type of competition. The use of the term "authorized" in the Act accords with this view; a pledge which is "*ultra vires*" cannot be said to be "authorized".

513 7

The City argues, however, that the pledge made by the national bank in this case, even though not authorized and outside the scope of its charter powers, should be given the same effect as State law gives to similar pledges by State banks. Such a result would be contrary to the result reached in *Texas & Pac. Ry.* v. *Pottorff*, 291 U. S. 245, and

Marion v. *Sneeden*, 291 U. S. 262, in which the Court held that a national bank might recover assets which had been pledged to secure deposits even though the depositor would not be paid in full because of supervening insolvency of the bank.

The City says that these decisions are not controlling because in neither did it appear that the law of the State where the transaction occurred gave any different effect to an *ultra vires* pledge by a bank than that given under the federal law. Nevertheless both decisions make it plain, 515 that, unless the right to pledge is expressly granted by a federal statute, a pledge to secure deposits in national banks is wholly unauthorized and, as Justice Brandeis said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255: "To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. • • • This policy of equal treatment was held to preclude, in case of a national bank, even the preference under §3466 of the Revised Statutes which otherwise is accorded to the United States when its debtor becomes insolvent. *Cook County* 516 *National Bank* v. *United States*, 107 U. S. 445. The effect of a pledge is to withdraw for the benefit of one depositor part of the fund to which all look for protection."

It is true that in spite of the foregoing general policy of the Act, Congress has seen fit to permit national banks to give security to depositors "of the same kind as is authorized by the law of the State", but it seems unreasonable to suppose that the general policy of the National Bank Act to prevent preferences is to be so limited as to permit hypothecations of assets that do not strictly fall within the statutory exceptions to a sound general rule requiring equal distribution of the assets of insolvent banks among all depositors. As we have already said the words

"authorized by the law of the State" plainly relate to the authority of state banks under their charters and not to the effect to be given to their *ultra vires* acts. Under the law of New York, as it existed at the time the Bank became insolvent, there can be no doubt that the pledges were unauthorized. In *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, and *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, the Court of Appeals held that enforcement of the law prohibiting pledges to secure deposits lay with the State Superintendent of Banks who, under his statutory powers, should be alert to prevent such pledges 5186
and to undo them prior to the occurrence of insolvency. The Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, evidently felt that the supervisory power of the Comptroller of the Currency was not enough to insure adequate enforcement of the policy to prevent pledges but that they should be treated by the courts as wholly void. The question of the right of a national bank to pledge its assets to secure depositors and the effect to be given to such a pledge when once made are both clearly matters of national concern. The rule in some of the states (including New York) that a bank is estopped to rescind a pledge to a depositor until he is paid in full is directly in the face of 5191
the policy attributed to the National Bank Act in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262. In this connection see *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372; *California Bank* v. *Kennedy*, 167 U. S. 362.

The rationale of the two cases cited from the New York Court of Appeals appears to be that a banking corporation organized under the laws of the State has certain actual powers outside the powers authorized by its charter and that its exercise of such *ultra vires* powers may create an estoppel not only against the corporation itself but also

against its general creditors. The measure of the powers of a national bank, on the other hand, is the statutory grant and powers not conferred by Congress are denied. The Act under which national banks are organized constitutes a complete system for their government. *Cook County Nat. Bank* v. *United States,* 107 U. S. 445, 448; *California Bank* v. *Kennedy,* 167 U. S. 362. The decision of the Supreme Court in *Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, 260-61, is based upon a holding that a national bank cannot exercise powers not granted so as to erect an estoppel against the general creditors for whose benefit the 521 limitation of powers was imposed. See *Concord First National Bank* v. *Hawkins,* 174 U. S. 364. If the problem here be viewed as depending upon the powers which a national bank can exercise it seems clear that the extent of its powers must be determined by an interpretation of the federal statute in the light of the policy therein expressed and that views of state courts on the powers of local corporations have no relevance except as Congress expressly makes them applicable. For the foregoing reasons the plaintiff receiver who represents the general creditors is not estopped to set aside the pledge that was made in this case.

522 The holding in *Willing* v. *Binenstock,* 302 U. S. 272, and *Scott* v. *Armstrong,* 146 U. S. 499, 510, that a setoff, allowed under the common law of a State to an insolvent bank is not objectionable as a preference, does not militate against avoiding the pledges here. The transactions in those cases were ones which the banks were authorized to make and the state law was followed because it did not conflict with the policy of the Bank Act. It is one thing to sanction a general rule of law which allows a depositor to set off his deposit against his indebtedness, it is another thing to sanction a preference based on a transaction forbidden by the Act.

While a national bank in some cases may be under a duty to return benefits it has received as the result of an *ultra vires* transaction (see *First National Bank* v. *Mott Iron Works*, 258 U. S. 240; *Citizens National Bank* v. *Appleton*, 216 U. S. 196), the rule if applicable here would not help the defendant since it would not be entitled to a preference against the other depositors of the insolvent bank in the absence of tracing a specific *res*. *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 261; *cf. Rankin* v. *Emigh*, 218 U. S. 27. It is well settled that the distribution of the assets of an insolvent national bank is governed by federal law and that state laws which attempt to create preferences which arise at the time of insolvency are to be disregarded. *Old Company's Lehigh, Inc.* v. *Meeker*, 294 U. S. 227; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Davis* v. *Elmire Savings Bank*, 161 U. S. 275.

The City claims that the payments to it prior to the Conservatorship were not made "after the commission of an act of insolvency, or in contemplation thereof * * * with a view to the preference of one creditor to another * * *". The Bank was closed from March 4, 1933 to March 6, 1933 under proclamations by the Governor of New York and the President of the United States. Later it was permitted to operate under restrictions imposed by the Secretary of the Treasury. On March 20 a Conservator was appointed with the powers of a receiver as provided in 12 U. S. C. A., §203. On January 23, 1934, the Comptroller of the Currency on a finding of insolvency appointed a receiver. The Bank never opened for regular business after March 4, 1933. No attempt was made by the appellants to show any change in the Bank's condition after March 4, 1933. We hold that the facts indicated that the Bank would not be able to pay its depositors in due course and the trial court could properly draw the inference that the pay-

ments were in violation of 12 U. S. C. A., §91. See *Dehne* v. *Mine Safety Appliance Co.*, 94 F. (2d) 956 (C. C. A. 3); *cf. Kullman* v. *Wooley*, 83 F. (2d) 129 (C. C. A. 5); *Willing* v. *Eveloff*, 94 F. (2d) 344 (C. C. A. 3); *Hardee* v. *Washington Loan & Trust Co.*, 91 F. (2d) 314 (App. D. C.).

The payments made by the Conservator were recoverable on still another theory because made out of the assets of an insolvent under a mistake of law. *LaParr* v. *City of Rockford, Ill.*, 100 F. (2d) 564 (C. C. A. 7); *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 152 (App. D. C.), aff'd. 297 U. S. 527 383. For the foregoing reasons the judgments in the four cases on appeal are affirmed.

528

529 5

Order for Mandate.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of August, one thousand nine hundred and thirty-nine.

Present:

530 6

Hon. LEARNED HAND,
Hon. AUGUSTUS N. HAND,
Hon. HARRIE B. CHASE,
Circuit Judges.

WALTER F. DOWNEY, Receiver, etc.,
Plaintiff-Appellee,

vs.

JOSEPH F. LOEHR, Mayor, *et al.*,
Defendant-Appellant.

No. 232.

531 7

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

IT IS FURTHER ORDERED that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver, etc.,

vs.

JOSEPH F. LOEHR, Mayor, *et al.*,

ORDER FOR MANDATE.

United States Circuit of Appeals,
Second Circuit,
Filed Aug. 22, 1939,
D. E. ROBERTS, Clerk.

535

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 178, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

536

WALTER F. DOWNEY, Receiver, etc.,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor, etc., *et al.*,

Defendants-Appellants.

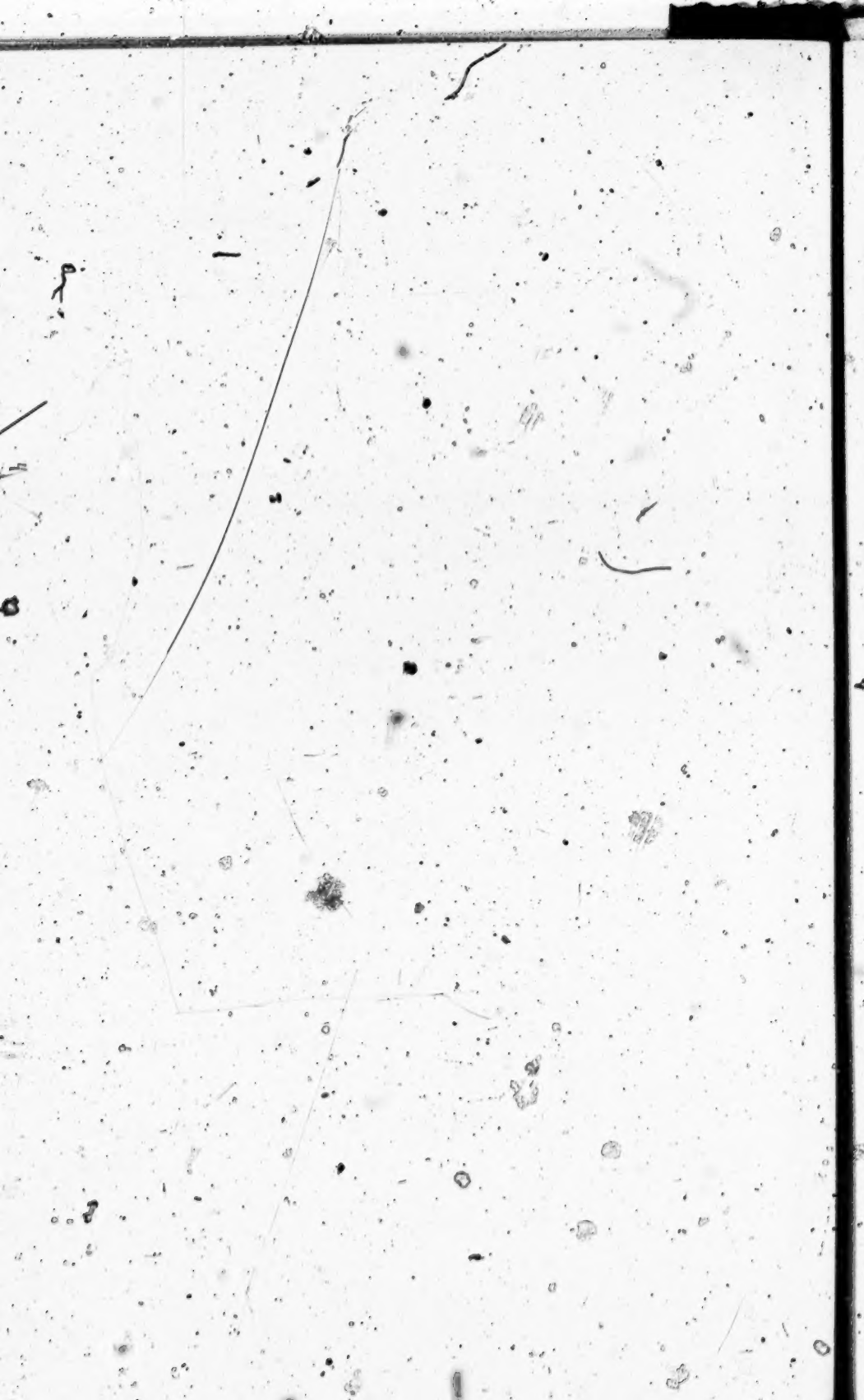
as the same remain of record and on file in my office.

537

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of September, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS,
Clerk.



SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5715)